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IN THE

Supreme Court of the United States

October Term, 1955.
No. 222

PREFERRED INSURANCE COMPANY, a corporation, MICHIGAN SURETY COMPANY, a corporation, MID-STATES INSURANCE COMPANY, a corporation, and THE MERCANTILE INSURANCE COMPANY OF AMERICA, a corporation,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

FIDELITY-PHENIX FIRE INSURANCE CO.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ALBERT G. WHIPPLE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

GEORGE STROPECK,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

GOVERNMENT EMPLOYEES INSURANCE COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ST. LOUIS FIRE & MARINE INSURANCE COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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SUBJECT INDEX

PAGE

Opinions below 2

Jurisdictional statement 2

Questions presented 2

Statutes and Regulations involved 3

Statement of the case 3

Reasons and argument for issuance of writ 6

I.

The questions involved are of such importance they should be settled by this Court 6

II.

Service incident property damage claims of military personnel are covered by the Tort Claims Act; the rule of Feres v. United States as to personal injury claims is not applicable to property damage claims 7

A. The opinion of the Court of Appeals 7

B. The holding of the Feres case 8

C. The statutory treatment of and administrative construction with respect to service incident property damage claims; the enactment of the Tort Claims Act 11

1. The Military Personnel Claims Act of May 29, 1945 11

2. The General Claims Acts preceding the Tort Claims Act 12

a. The Gunfire Act of August 24, 1912 12

b. The Small Tort Claims Act of December 28, 1922 13

c. The Military Claims Act of July 3, 1943 14

PAGE

3. The Federal Tort Claims Act of 1946..... 16

4. The Tort Claims Act covers service incident property damage claims; Feres v. United States is not to the contrary..... 18

III.

The property damage claims here involved were not service incident 25

A. The test applied by the Courts of Appeals to property damage claims was improper and contrary to the rule of the Feres and Brooks cases..... 25

B. The administrative allowance of the uninsured claims under the Military Personnel Claims Act is not here controlling 28

Conclusion 29

Appendices:

Appendix A. Opinion of the Court of Appeals and Judgments .....App. p. 1

Appendix B. Opinions of Judge Advocates General....App. p. 17

TABLE OF AUTHORITIES CITED

CASES **PAGE**

Billings v. Truesdell 321 U. S. 542 21
Brooks v. United States, 337 U. S. 49 ..... 3, 6, 7, 25
Brown v. United States, 99 Fed. Supp. 685 25
Dalehite v. United States, 346 U. S. 15 ..... 7, 9
Employers' Fire Ins. Co. v. United States, 167 F. 2d 655 21
Feres v. United States, 340 U. S. 135 ..... 3, 5, 6, 7, 8, 9, 17, 19 20, 21, 22, 23, 25, 28, 29
Fidelity-Phenix Fire Insurance Co. v. United States, 111 Fed. Supp. 899 2
Fleming v. Mohawk Co., 331 U. S. 111 21
Herring v. United States, 98 Fed. Supp. 69 25
Lund v. United States, 104 Fed. Supp. 756 26
Samson v. United States, 79 Fed. Supp. 406 ..... 19, 25
United States v. Aetna Casualty & Surety Co., 338 U. S. 366 ..... 5, 7, 21, 22
United States v. Brown, 348 U. S. 110 ..... 7, 19, 22, 23, 29
United States v. Gilman, 347 U. S. 507 7
United States v. Jackson, 280 U. S. 183 21
United States v. Spelar, 338 U. S. 217 7
United States v. Yellow Cab Co., 340 U. S. 543 ..... 7, 20
Zoula v. United States, 217 F. 2d 81 23

MISCELLANEOUS

1 Bulletins, Judge Advocate General of the Army, p. 331 13
2 Bulletins, Judge Advocate General of the Army, pp. 274-275 26
4 Bulletins, Judge Advocate General of the Army, p. 62 26
4 Bulletins, Judge Advocate General of the Army, p. 287 ..... 16, 26
5 Bulletins, Judge Advocate General of the Army, p. 68 16
Digest of Opinions, Judge Advocate General of the Army, 1912-1940, Sec. 709, p. 449 13

PAGE

Digest of Opinions, Judge Advocate General of the Army, 1912-1940, Sec. 713, p. 456 13
1 Digest of Opinions of the Judge Advocate General of the Army, Claims, Sec. 94.3, pp. 65-66 26
1 Digest of Opinions of the Judge Advocate General of the Armed Forces, Claims, Sec. 95.5, p. 70 17
1 Digest of Opinions of the Judge Advocate General of the Armed Forces, Claims, Sec. 95.7, p. 71 17
2 Digest of Opinions of the Judge Advocate General of the Armed Forces, Claims, Sec. 93.9, p. 63 17
2 Digest of Opinions of the Judge Advocate General of the Army, Claims, Sec. 94.1, p. 64 26
House Report No. 237 15

RULES

Rules of the United States Supreme Court, Rule 19(1)(b) 7
Rules of the United States Supreme Court, Rule 23(5) 3

STATUTES

32 Code of Federal Regulations, Regulation 536.22 18
32 Code of Federal Regulations, Regulations 836.92-836.95 11
Federal Torts Claims Act (60 Stat. 842, amended by 62 Stat. 933, 982-4, 63 Stat. 62, 101, 106-7, 444) 3
Federal Tort Claims Act, Sec. 424(a) (60 Stat. 846) 17
Federal Tort Claims Act, Sec. 1346(b) 16
Federal Tort Claims Act, Sec. 2672 16
Military Claims Act of July 3, 1943, Sec. 1 14
Military Claims Act of 1945 (59 Stat. 662) 14
Military Claims Act of 1946 (60 Stat. 332) 14
Military Personnel Claims Act of 1945, Sec. 4 ..... 14, 15

PAGE

Military Personnel Claims Act of 3-3-49 (9 Stat. 415); of 3-3-63 (12 Stat. 743); of 3-3-85 (23 Stat. 350); of 7-9-18 (40 Stat. 880); of 3-4-21 (41 Stat. 1436); of 5-29-45 (59 Stat. 225) 11

United States Code Annotated, Title 28, Sec. 1254(1) 2

United States Code Annotated, Title 28, Sec. 1346 .....3, 5

United States Code Annotated, Title 28, Secs. 2671-2680.....3, 5

United States Code Annotated, Title 31, Sec. 223(b).....9, 17

United States Code Annotated, Title 31, Sec. 322(c).....4, 11

United States Code Annotated, Title 31, Sec. 223(d)..... 14

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PREFERRED INSURANCE COMPANY, a corporation; MICHIGAN SURETY COMPANY, a corporation; MID-STATES INSURANCE COMPANY, a corporation; and THE MERCANTILE INSURANCE COMPANY OF AMERICA, a corporation,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

AND FIVE CONSOLIDATED CASES.

Petition for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioners Preferred Insurance Company, Michigan Surety Company, Mid-States Insurance Company, The Mercantile Insurance Company of America, Fidelity-Phenix Fire Insurance Company of New York, Albert G. Whipple, George Stropeck, Government Employees Insurance Company and St. Louis Fire & Marine Insurance Company, respectfully petition that writs of certiorari

issue to review the judgments of the United States Court of Appeals for the Ninth Circuit, entered in the above cases on May 9, 1955.

OPINIONS BELOW.

The opinion of the Court of Appeals[1] has not yet been reported. The opinion of the District Court is reported at 111 Fed. Supp. 899, *sub nom. Fidelity-Phenix Fire Insurance Co. v. United States* [R. 22-37].[2]

JURISDICTIONAL STATEMENT.

The judgments of the Court of Appeals were entered May 9, 1955. No rehearings were requested, nor has any order been made extending the time within which to petition for certiorari.

Jurisdiction of this Court to review the judgments of the Court of Appeals is conferred by 28 USCA sec. 1254(1).

QUESTIONS PRESENTED.

1. Are service incident property damage claims of military personnel within the coverage of the Federal Tort Claims Act?

2. In view of the completely different statutory history and treatment of service incident property damage and

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[1]Hereafter referred to as Opinion and reproduced in Appendix "A," pp. 1-13. Page references herein to the Opinion will be to Appendix "A."

[2]The Record references herein are to the Transcript of Record before the Court of Appeals which has been filed with this Court pursuant to Rule 21.

personal injury claims, is the rule of *Feres v. U. S.*, 340 U. S. 135, that service incident personal injury claims are not covered by the Tort Claims Act, applicable to such property damage claims?

3. Is it contrary to *Brooks v. U. S.*, 337 U. S. 49, and *Feres v. U. S., supra,* to hold that damage to property of military personnel negligently caused by the government, must be held to be service incident where, at the time of damage, the property is located in a government facility that the soldier is making use of voluntarily for his own convenience and not pursuant to any military orders or while on a military mission?

STATUTES AND REGULATIONS INVOLVED.

These suits involve the Federal Tort Claims Act (60 Stat. 842, amended by 62 Stat. 933, 982-4, 63 Stat. 62, 101, 106-7, 444; now 28 USCA secs. 1346, 2671-2680), which act, for the sake of clarity and continuity, will be referred to in more detail hereinafter.

STATEMENT OF THE CASE.

The consolidated cases[3] arose out of the crash of a B-29 Air Force plane at Fairfield-Suisun Air Force Base, California, on August 5, 1950, as a result of the alleged

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[3]These six cases involving identical questions were consolidated for hearing both in the District Court and the Court of Appeals. The plaintiffs and appellants in each of the six cases have joined in this single petition for certiorari pursuant to Rule 23, (5) of the Rules of this Court.

negligence of the government personnel in charge. The resulting explosion and fire damaged a number of house trailers owned and occupied by Air Force personnel assigned to the Base, and their families, which trailers were parked in a trailer park located on the Base. The use of the trailer park by the personnel was voluntary and for their convenience, and not under the compulsion of any military orders; they could have lived off the Base had they preferred. They paid rental to the government for the trailer space occupied, and drew the regular quarters allowance paid to personnel not furnished government quarters. The trailer owners had no duties with respect to the plane that crashed. At the time of the crash, they were variously located, some on and some off duty, in the trailer park, at other places on the Base, in neighboring communities, and at other military installations in the United States and overseas [R. 3-9, 12-17].

Petitioners, the insurers of the various trailers, paid the respective owners the amounts of the losses, which payments totaled $68,340.57.[4] The owners had other uninsured property that was damaged and for which they made claim and were reimbursed by the government under the Military Personnel Claims Act, 31 USCA, sec. 222(c). The claims of the insurers were not compensable under

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[4]The Opinion inadvertently refers to the total amount of the losses as $49,661. This latter figure represents the amount involved in the Preferred Insurance Co. case.

that Act, as the Regulations under the Act exclude subrogated claims[5] [R. 6-7, 15, 18-20].

Petitioners then brought these suits in the District Court under the Tort Claims Act (28 USCA, secs. 1346, 2671, *et seq.*) to recover the amounts of their respective loss payments by virtue of their rights of subrogation (See *United States v. Aetna Casualty & Surety Co.*, 338 U. S. 366).

The District Court dismissed the suits on the ground that the Military Personnel Claims Act was the exclusive remedy of military personnel for service incident property damage, and therefore such claims were not covered by the Tort Claims Act. The Court of Appeals affirmed on the ground that the rule of the *Feres* case with respect to service incident personal injury claims was applicable to property damage claims and because it found these claims to be service incident.[6]

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[5]The said Act and Regulations also contain many other restrictions and exclusions that apply directly to the claims of military personnel, as will be noted *infra*.

[6]While these cases involve subrogated claims, the Opinion makes clear that it necessarily and directly applies to all military personnel (and not merely their insurers) and denies them the right to make claim under the Tort Claims Act for service incident property damage.

REASONS AND ARGUMENT FOR ISSUANCE OF WRIT.

I.

The Questions Involved Are of Such Importance They Should Be Settled by This Court.

The decision of the Court of Appeals denies to military personnel the right to make claim under the Tort Claims Act for service incident property damage, and leaves such personnel with only the restricted coverage provided by the Military Personnel Claims Act for such claims. As authority, the Opinion relies entirely on *Feres v. U. S., supra,* which dealt only with service incident personal injury claims. In reaching its decision, the Court of Appeals has ignored and refused to consider the completely different statutory background and treatment of, and administrative construction with respect to, service incident property damage and personal injury claims, which it is felt establish that service incident property damage claims are covered by the Tort Claims Act, and that the *Feres* decision is inapplicable thereto.

Also, it is felt that the rule announced by the decision as to whether property damage is service incident is in conflict with the rule of the *Feres* and *Brooks* cases, and improperly and substantially restricts the property damage claim rights of military personnel.

While these questions are here raised by insurance company subrogees, there can be no question but that the decision directly affects and applies to military personnel.

Because these cases involve important questions of interpretation and coverage of the Tort Claims Act that have not been decided by this Court and that substantially

affect the property damage claim rights of all members of the armed forces, and involve the application of the *Feres* and *Brooks* cases to these issues, it is submitted that these questions should be settled by this Court (Revised Rules, S. Ct. U. S., Rule 19, (1)(b)).[7]

II.

Service Incident Property Damage Claims of Military Personnel Are Covered by the Tort Claims Act; the Rule of Feres v. United States as to Personal Injury Claims Is Not Applicable to Property Damage Claims.

A. The Opinion of the Court of Appeals.

The Opinion notes that the *Feres* case dealt only with service incident personal injury claims, but concludes that the considerations that led to the *Feres* decision are equally applicable to service incident property damage claims. In reaching this conclusion the Opinion notes (pp. 6-7) the stress placed in the *Feres* opinion on the comprehensive system of benefits that Congress had provided over the years to take care of service incident personal injury claims. The Opinion then attempts to analo-

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[7]This Court has granted certiorari in the following cases involving the construction and interpretation of the Tort Claims Act, because of the importance of the question involved, or to determine the proper application of its previous decisions to the question at issue: *Brooks v. U. S.*, 337 U. S. 49 (coverage of non-service incident personal injury claim of soldier); *U. S. v. Spelar*, 338 U. S. 217 (coverage of claim arising at airbase in Newfoundland); *U. S. v. Aetna Cas. & S. Co.*, 338 U. S. 366 (coverage of claim of subrogee); *U. S. v. Yellow Cab Co.*, 340 U. S. 543 (impleading U. S. as a third party defendant); *Dalehite v. U. S.*, 346 U. S. 15 (liability of government for discretionary acts); *U. S. v. Gilman*, 347 U. S. 507 (right of U. S. to recover indemnity from employee); *U. S. v. Brown*, 348 U. S. 110 (coverage of claim for injury sustained by veteran in Veterans Hospital).

gize this personal injury system of benefits to the Military Personnel Claims Act of 1945, which provides certain claim benefits to soldiers for service incident property damage. In this connection, the Opinion states that this latter Act is "more liberal, adequate and satisfactory than any of its predecessor acts" (p. 7); that a Congressional Report preceding the passage of the Act referred to it as a "single" statute for the settlement of such claims (p. 7, footnote 1); and that this Act provides "a simple, certain and uniform method of compensation for service incident property damage" (p. 9). Having thus satisfied itself that the analogy between the treatment of personal injury and property damage claims is complete, the Opinion concludes that the "rationale" of *Feres* is applicable here, and that service incident property damage claims are not covered by the Tort Claims Act (p. 9).

B. The Holding of the Feres Case.

Because the Opinion is based entirely on its conclusion that the "rationale" of *Feres* is valid here, it is important to first examine *Feres* and the problem of statutory construction there involved.

In reaching its conclusion in that case that Congress did not intend the Tort Claims Act to cover service incident personal injury claims, this Court considered it important to note the pre-Tort Claims Act treatment of such claims. This disclosed that over the years Congress had provided a comprehensive and liberal system of simple, certain and uniform benefits applicable to all soldiers and all service incident injuries, and with remedies provided for the enforcement thereof; further, it was noted that no federal law had ever recognized such claims, but on the contrary the claims statutes applicable to civilians gener-

ally, excluded service incident personal injury claims of military personnel.[8]

That the foregoing played a heavy part in the conclusion reached is evidenced by the following excerpts from the *Feres* opinion:[9]

> "This Act, however, should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole" (p. 139).
>
> "The primary purpose of the Act was to extend a remedy to those who had been without; if it incidentally benefited those already well provided for, it appears to have been unintentional. Congress was suffering from no plague of private bills on behalf of military and naval personnel, because a comprehensive system of relief had been authorized for them and their dependants by statute" (p. 140).
>
> "We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the government he is serving" (p. 141).
>
> "We find no parallel liability before and we think no new one has been created by this Act. Its effect is to waive immunity from recognized causes of ac-

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[8]See, for example, Military Claims Act of 1943, 31 USCA, sec. 223(b).

[9]In *Dalehite v. U. S.*, 346 U. S. 15, 31-32, footnote 25, this Court characterized the basis of its decision in the *Feres* case as follows:

> "The existence of a uniform compensation system for injuries to those belonging to the armed services led us to conclude that Congress had not intended to depart from this system and allow recovery by a tort action dependent on state law."

tion and was not to visit the Government with novel and unprecedented liabilities" (p. 142).

"No Federal law recognizes a recovery such as claimants seek. The Military Personnel Claims Act, 31 USCA sec. 223(b), FCA title 31, sec. 223(b) (Now superseded by 28 USCA sec. 2672 [The Tort Claims Act]) permitted recovery in some circumstances, but it specifically excluded claims of military personnel 'incident to their service.'[10]

"This court, in deciding claims for wrongs incident to service under the Tort Claims Act, cannot escape attributing some bearing upon it to enactments by Congress which provided systems of simple, certain and uniform compensation for injuries or death of those in armed services. * * * If Congress had contemplated that this Tort Act would be held to apply in cases of this kind, it is difficult to see why it should have omitted any provision to adjust these two types of remedies to each other. The absence of any such adjustment is persuasive that there was no awareness that the Act might be interpreted to permit recovery for injuries incident to military service" (p. 144).

"The compensation system, which normally requires no litigation, is not negligible or niggardly * * *" (p. 145).

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[10]The reference to the Military Personnel Claims Act was inadvertent, as the citation is to the Military Claims Act, *supra*, to which the Court was obviously referring. Likewise, the reference to claims excluded by that act must be deemed to be to personal injury claims, with which the Court was concerned, and not to property damage claims. As will be pointed out hereafter, service incident property damage claims were covered under the Military Claims Act.

C. The Statutory Treatment of and Administrative Construction With Respect to Service Incident Property Damage Claims; the Enactment of the Tort Claims Act.

1. THE MILITARY PERSONNEL CLAIMS ACT OF MAY 29, 1945 (59 Stat. 225; now, as amended, 31 USCA, sec. 222(c)).

Since 1849, Military Personnel Claims Acts have been available to military personnel with respect to service incident property damage claims.[11] While each of these acts has been broader than its predecessor, basically, each was (and is) simply an act of grace reposing complete discretion in the administrative department concerned to allow or reject any claim in whole or in part (subject to the exclusions and restrictions in the Act and Regulations); and no remedy is provided in the event of a rejected or reduced claim.

These exclusions and restrictions are numerous and broad. The 1945 Act (31 USCA, sec. 222(c)) excludes coverage for property (as to kind or amount) that is not considered to be reasonable, useful, necessary, or proper under the attendant circumstances, or where the loss occurs at quarters occupied by the claimant which are not assigned to him or otherwise provided in kind by the Government; and since 1952, no claim may be made in excess of $2500.00. The Regulations adopted by the Secretary of Defense pursuant to the Act (32 C. F. R. 836.92-836.95) further exclude recovery for loss or damage to motor vehicles (except in special circumstances which may be presented for "consideration"), expensive

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[11]Military Personnel Claims Acts of 3/3/49 (9 Stat. 415); of 3/3/63 (12 Stat. 743); of 3/3/85 (23 Stat. 350); of 7/9/18 (40 Stat. 880); of 3/4/21 (41 Stat. 1436); of 5/29/45 (59 Stat. 225; 31 USCA, sec. 222(c)).

articles, unnecessary property, jewelry, money (except limited amounts deposited for safekeeping), clothing being worn, transportation and baggage losses not conforming to government requirements as to weight, etc., and losses which have been recovered or are recoverable from an insurer.[12]

It is apparent that this Act and the restricted benefits provided by it are in no sense analogous to the personal injury statutes and benefits considered in the *Feres* case.

2. The General Claims Acts Preceding the Tort Claims Act.

Since 1912, with the exception of the 1943-45 period, Congress has provided that service incident property damage claims of military personnel were covered under the claim statutes applicable to civilians generally, and were not restricted to the limited benefits of the Military Personnel Claims Act.

a. *The Gunfire Act of August 24, 1912* (37 Stat. 586).

This was the first general claims act covering property damage claims incident to noncombat activities of the Army. It authorized the Secretary of War to consider

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[12]The restricted coverage provided by this Act is illustrated by the instant record. The sample claim attached to the Stipulation of Facts [R. 18-20] shows that the soldier involved claimed he had sustained a total property loss of $4857.49, of which $3200.00 was covered by insurance and $1657.49 was uninsured. The insured portion was not part of the claim because of the exclusion of insured claims. The uninsured claim of $1657.49 was only allowed in the sum of $852.25. Several of the trailers were damaged in excess of $2500.00 [R. 7], and since 1952, no claim in excess of that amount could be allowed, even if uninsured. And motor vehicle damage could be allowed only because this occurrence was classed as a public disaster [R. 36].

and adjust "all claims" for damage to private property not in excess of $1000 resulting from noncombat activities of the Army, with provision for Congress to appropriate the funds to pay allowed claims.

The Judge Advocate General of the Army ruled that this act covered service incident property damage claims of military personnel,[13] and Congress appropriated the funds over the years to pay such claims.

b. *The Small Tort Claims Act of December 28, 1922* (42 Stat. 1066).

This was the first general tort claims act. It authorized department heads to consider and adjust "any claim" for negligent damage to "privately owned property" up to $1000 caused by the negligence of government employees. Allowed claims were certified to Congress for payment; and claims over $1000 required a special Congressional bill in order to be paid.

Again, the Judge Advocate General of the Army ruled that this act covered service incident property damage claims of military personnel,[14] and Congress appropriated the funds over the years to pay such claims.

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[13] *Digest of Opinions, Judge Advocate General of the Army,* 1912-1940, p. 449, sec. 709. For the convenience of the Court, Judge Advocate General opinions referred to in this Petition are reproduced in Appendix "B" hereto. This particular opinion will be found at para. 1, p. 17, App. "B."

[14] *Digest of Opinions, Judge Advocate General of the Army,* 1912-40, p. 456, sec. 713.

(For this opinion, see para. 2(a), p. 18, App. "B".)

1 *Bull. JAG* 331. The reference is to Bulletins, Judge Advocate General of the Army.)

(For this opinion, see para. 2(b), p. 18, App. "B".)

c. *The Military Claims Act of July 3, 1943* (57 Stat. 372; now, as amended, 31 USCA, sec. 223(b)).

This Act, when enacted, authorized the Secretary of War to consider and pay "any claim" for personal injury or property damage (negligent or non-negligent), subject to Regulations prescribed by him, caused by military personnel and arising out of noncombat activities of the War Department[15] not exceeding $500[16] in amount, with provision for claims over that amount to be reported by the Secretary of War to Congress for its consideration.

Section 1 excluded from its coverage "claims for damage to or loss or destruction of property of military personnel or civilian employees of the War Department or of the Army, or for personal injury or death of such persons, if such damage, loss, destruction, injury or death occurs incident to their service."

Since this Act covered both negligence and non-negligence claims against the Army, section 4 provided that the Small Tort Claims Act of 1922, *supra,* was thereafter inapplicable to the War Department, and that the Gunfire Act of 1912, *supra,* was repealed.

As a result, service incident property damage claims were thereafter (until 1945) covered only under the Military Personnel Claims Act.

In 1945, Congress amended the Military Claims Act of 1943 so as to provide for the inclusion thereunder of service incident property damage claims of military personnel. This amendment was contained in section 4 of the

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[15]In 1945 (59 Stat. 662) this act was extended to include the Navy Department. (See 31 USCA, sec. 223(d)).

[16]In 1946, this amount was increased to $1000 (60 Stat. 332).

Military Personnel Claims Act of 1945, supra, which provided as follows:

> "Sec. 4. That portion of section 1 of the Act of July 3, 1943 (Military Claims Act) reading as follows: 'The provisions of this Act shall not be applicable * * * to claims for damage to or loss or destruction of property of military personnel or civilian employees of the War Department or of the Army, or for personal injury or death of such persons, if such damage, loss, destruction, injury or death occurs incident to their service' is hereby amended * * * to read as follows: 'The provisions of this Act shall not be applicable * * * to claims for personal injury or death of military personnel or civilian employees of the War Department or of the Army if such injury or death occurs incident to their service.' "[17]

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[17]In footnote (1) of its Opinion (pp. 7-8), the Court of Appeals quotes at length from House and Senate Reports on the 1945 Military Personnel Claims Act which contain language indicating that said Act was intended to provide a *"single"* remedy for service incident property damage claims. This language appears to have been responsible for the erroneous conclusion of the District Judge that the Military Personnel Claims Act was the exclusive remedy for such claims. By including this reference in its Opinion and by other statements contained therein, it appears that the Court of Appeals fell into the same error. In this connection it should be noted that to House Report 237 (quoted in said footnote (1)), there were attached letters from the Judge Advocate General and the Secretary of War (who apparently drafted the 1945 Act) in which they point out that the 1945 amendment (sec. 4, *supra*) was intended to restore to military personnel, service incident property damage claim rights that had been taken away by the 1943 Military Claims Act (and which deprivation had resulted in damage to troop morale), by amending the Military Claims Act of 1943 so that it would thereafter cover such claims. In any event, the 1945 amendment itself is unambiguous and does so provide, and the inadvertent use of the word "single" in said Reports can be of no significance.

Thereafter, the Judge Advocate General of the Army ruled that the Military Claims Act of 1943 covered service incident property damage claims,[18] and such claims were paid by funds appropriated by the Congress.

(3) THE FEDERAL TORT CLAIMS ACT OF 1946 (60 Stat. 842, amended by 62 Stat. 933, 982-4, 63 Stat. 62, 101, 106-7, 444; now 28 USCA secs. 1346, 2671-2680).

In 1946, the same (79th) Congress that enacted the Military Personnel Claims Act of 1945, enacted the Federal Tort Claims Act. Section 2672 of the Act provides for administrative settlement of claims not exceeding $1,000:

> "Sec. 2672. The head of each federal agency may consider, ascertain, adjust, determine, and settle any claim for money damages of $1,000 or less against the United States * * * for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. * * *"

Section 1346(b) of the Act provides that suit may be brought against the Government in the District Court on all such claims, whether for more or less than $1,000.

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[18]4 *Bull. JAG* 287.
(For this opinion, see para. 3(a), p. 19, App. "B".)
5 *Bull. JAG* 68.
(For this opinion, see para. 3(b), p. 20, App. "B".)

Section 424(a)[19] of the Act provided that all statutes which authorized the administrative adjustment of claims for property damage and personal injury due to the negligence of government employees "are hereby repealed in respect of claims cognizable" under the Act, and the Military Claims Act of 1943 was specifically mentioned as one of the statutes so repealed *pro tanto*. The net effect of this repeal was to leave the latter act in force as to non-negligence claims, and to transfer negligence claims (both under and over $1,000) previously cognizable under that act to the Tort Claims Act.[20]

Since the passage of the Tort Claims Act, the Judge Advocates General of the services have ruled that service incident property damage claims of military personnel are covered under the Tort Claims Act as well as the other two acts.[21] And Congress has undoubtedly appropriated the funds for payment of such claims.

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[19]The reference is to 60 Stat. 846, as this section of the Act has never been codified.

[20]To this effect, see Historical Note entitled "Repeals" following 31 USCA, sec. 223(b) (Military Claims Act of 1943).

This repeal of the Military Claims Act by the Tort Claims Act was noted by this Court in the *Feres* case (p. 144):

"The Military * * * Claims Act * * * (now superseded by 28 U.S.C.A. sec. 2672) * * *"

[21]1 *Dig. Ops.*, Claims, sec. 95.7, p. 71. (The reference is to Digest of Opinions of the Judge Advocates General of the Armed Forces.)

(For this opinion, see para. 4(a), pp. 20-21, App. "B".)

1 *Dig. Ops.*, Claims, sec. 95.5, p. 70.

(For this opinion, see para. 4(b), pp. 21-23, App. "B".)

2. *Dig. Ops.*, Claims, sec. 93.9, p. 63.

(For this opinion, see para. 4(c), pp. 23-24, App. "B".)

(4) THE TORT CLAIMS ACT COVERS SERVICE INCIDENT PROPERTY DAMAGE CLAIMS; FERES v. U. S. IS NOT TO THE CONTRARY.

In light of the foregoing, it is submitted that the only reasonable conclusion is that in enacting the Tort Claims Act, Congress intended that service incident property damage claims were to be covered thereunder.

Property damage claims of military personnel, both service incident and non-service incident, and negligent and non-negligent, arising out of noncombat activities of the Air Force, were covered by the Military Claims Act of 1943 prior to enactment of the Tort Claims Act.[22] That act provided for administrative handling of claims not in excess of $1,000, and for a Congressional bill if over $1,000. The Military Claims Act was superseded (as to negligence claims) by the Tort Claims Act. The two statutes contain almost identical language as to claims covered: "any claim against the United States * * * for damage to or loss or destruction of property" (Military Claims Act); "any claim against the United States for injury or loss of property" (Tort Claims Act). The superseding of the Military Claims Act by the Tort Claims Act was in general language and it would be a strained construction to hold that what Congress meant thereby was that all negligence claims covered by the Military Claims Act, *except service incident property damage claims of military personnel,* were transferred to the Tort

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[22]The claims here sued upon would have been so covered, since they arose out of allegedly negligent noncombat activities of the Air Force, and claims of subrogees were not excluded from coverage under the Military Claims Act (32 C. F. R. 536.22).

Claims Act.[23] And this conclusion finds confirmation in the long standing Congressional policy that accorded military personnel the same claim rights as civilians with respect to such claims.

In the *Feres* case, with respect to service incident personal injury claims, this Court made the following significant statements, some of which were quoted in *U. S. v. Brown, supra,* 348 U. S. 110:

> "We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the government he is serving (p. 141). * * * We find no parallel liability before and we think no new one has been created by this Act. Its effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities (p. 142). * * * No federal law recognizes a recovery such as claimants seek. The Military * * * Claims Act, 31 USCA sec. 223(b) * * * (now superseded by 28 USCA sec. 2672), permitted recovery in some circumstances, but it specifically excluded claims of military personnel 'incident to their service' (p. 144)."

While this language correctly describes the situation with respect to service incident personal injuries, it is apparent that precisely the opposite situation exists with respect to service incident property damage claims. The very Military Claims Act of 1943 referred to in the *Feres*

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[23]For a case analyzing this superseding of the Military Claims Act by the Tort Claims Act in an analogous situation and holding that the latter "must therefore be construed in the light of the law which it supplanted", see *Samson v. U. S.* (S. D., N. Y.), 79 Fed. Supp. 406.

case (and prior federal claims statutes) covered service incident property damage claims of military personnel. So that as to such claims, in the language of *Feres*, there was a "federal law (which) recognizes a recovery such as claimants seek"; therefore, to hold that the Tort Claims Act covers such claims is "not to visit the Government with novel and unprecedented liabilities."

The foregoing finds confirmation in this Court's analysis of the Tort Claims Act in *U. S. v. Yellow Cab Co.*, 340 U. S. 543, 548-9, where this Court stated:

> "The words *'any claim* against the United States . . . on account of personal injury' (emphasis supplied) are broad words in common usage. They are not words of art. * * *
>
> This Act does not subject the Government to a previously unrecognized type of obligation. Through hundreds of private relief acts, each Congress for many years has recognized the Government's obligation to pay claims on account of damage to or loss of property or on account of personal injury or death caused by negligent or wrongful acts of employees of the Government. This Act merely substitutes the District Courts for Congress as the agency to determine the validity and amount of the claims. It suggests no reason for reading into it fine distinctions between various types of such claims."

In light of the administrative and Congressional bill coverage of service incident property damage claims by the Military Claims Act, to hold that such claims are covered by the Tort Claims Act "does not subject the Government to a previously unrecognized type of obligation."

Moreover, the administrative construction under the Tort Claims Act and under the claims statutes it super-

seded that service incident property damage claims were covered thereunder, coupled with Congressional confirmation and ratification of such construction by appropriation of funds for payment of such claims, is entitled to the greatest weight in determining the Congressional intent with respect to this issue. To this effect, see:

Fleming v. Mohawk Co., 331 U. S. 111, 116;

U. S. v. Jackson, 280 U. S. 183, 193;

Billings v. Truesdell, 321 U. S. 542, 552-3;

U. S. v. Aetna Cas. & Surety Co., supra, 338 U. S. 366, 376-7;

Employers' Fire Ins. Co. v. U. S. (C. A. 9), 167 F. 2d 655, 657.

The Court of Appeals in its disposition of this case has simply refused to consider or discuss this important problem of statutory construction and background, although the same was fully presented in petitioners' briefs. In this connection, the Opinion does no more than cite the prior claims statutes, and then summarily dismiss them as immaterial because they did not contain a suit provision, and hence created no "liability" on the government (Op. pp. 8-9).

But, for the reasons heretofore noted, this cannot be an adequate or tenable treatment of this issue. The coverage of service incident property damage claims by the administrative and Congressional bill provisions of the Military Claims Act and prior acts was a recognition of "a recovery such as claimants seek" and of the Government's "obligation" to pay such claims. Since it was considered material that these prior claims statutes excluded service incident personal injury claims, as pointed out in the *Feres* case *supra,* (p. 144), such statutes may not

now be dismissed as immaterial where it is shown they covered service incident property damage claims simply because they did not permit suit. Moreover, no one could sue the government for negligence before adoption of the Tort Claims Act; therefore, the absence of a previous right to sue cannot be relevant to a determination of whether a particular group of claimants are covered under the Act. For example, in determining whether subrogees were intended to be covered by the Act, it has been held material that their claims had been held to be covered under these same prior claims statutes (See *U. S. v. Aetna Cas. & Surety Co., supra,* 338 U. S. 366, 376-377).

We are aware that in *Feres,* this Court was influenced in part by its conclusion that suits for service incident personal injury claims might have an adverse effect on military discipline, having in mind the relation of the soldier to his superiors (*U. S. v. Brown,* 348 U. S. 110).

But this ground of the decision cannot be isolated from the problem of statutory construction and statutory background that was there presented. In *Feres,* this court did not purport to substitute its judgment for that of Congress as to whether soldiers *should* be permitted to sue the government for service incident personal injuries; its only purpose was to arrive at the Congressional intent. As has been noted, in arriving at such intent an analysis of the pre-Tort Claims Act treatment of such claims was necessarily of prime significance. In the light of such statutory background, to have there held that the Tort Claims Act covered such personal injury claims would have been to attribute to Congress a completely unex-

pressed intent to provide an entirely new and additional remedy, in a situation where there was no need therefor. Moreover, the *Feres* decision resulted in no restriction whatsoever of existing service incident personal injury claim benefits.

But it is a far cry from this situation to hold, as the Court of Appeals does, that soldiers are to now be restricted to the limited benefits of the Military Personnel Claims Act for service incident property damage,[24] and deprived of claim rights that have been accorded them under the Tort Claims Act, because that Court concluded that the benefits provided by the Military Personnel Claims Act are sufficient and because such a conclusion may avoid "serious disruption of military mission" (Op. p. 9).

It is submitted that to apply *Feres* to property damage claims is a distortion of the holding in that case that here results in a substantial restriction of the claim rights of

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[24]A similar conclusion was reached by the Court of Appeals for the Fifth Circuit in *Zoula v. U. S.*, 217 F. 2d 81. In that case, it was held that service incident property damage claims were excluded from coverage under the Tort Claims Act upon the following grounds (1) a citation of the District Court Opinion herein, (2) an approval and adoption of the argument of the government (made on appeal in both the *Zoula* case and the instant cases) that "the complete and comprehensive system of administrative compensation" provided by the Military Personnel Claims Act "precludes resort by members of the armed services to the Tort Claims Act for such property damage"; and (3) a strong intimation that the *Feres* case really overruled the *Brooks* case wherein it had been held that non-service incident personal injury claims of military personnel were covered by the Tort Claims Act. But in *U. S. v. Brown, supra,* 348 U. S. 110, this Court held directly contrary to points (2) and (3) and it would therefore appear that the *Zoula* case is entitled to no weight. However, it adds to the confusion surrounding the problem involved here, which should be cleared up by this Court.

military personnel, and substitutes a judicial opinion of what the law should be in place of what Congress has said it should be. Congress, in the exercise of its powers, and no doubt because of the many different factors involved, has seen fit over the years to treat service incident personal injury and property damage claims in a completely different manner, and it is not the province of any court to interfere with such policy.

Moreover, actual experience has shown that, while permitting claims for service incident personal injury claims under the Tort Claims Act might well pose serious problems with respect to military discipline, this has not proven to be so with respect to service incident property damage claims, no doubt because of the different factors involved. From 1946 to at least 1953 (when the District Judge announced his decision herein), the Tort Claims Act, as noted above, has been construed to include service incident property damage claims, and this period included the Korean conflict. And there has been no indication from any source that such coverage had any adverse effect on military discipline or efficiency; on the contrary, were soldiers to go uncompensated for service incident property damage losses resulting from the negligence of the government, an adverse effect on morale could be anticipated (see Footnote 1, Op. pp. 7-8).

III.

The Property Damage Claims Here Involved Were Not Service Incident.

A. The Test Applied by the Court of Appeals to Property Damage Claims Was Improper and Contrary to the Rule of the Feres and Brooks Cases.

The Opinion holds that damage to property must be held to be service incident where, at the time of damage, the property is located on a military base solely because of the military service of the owner, and where the damage results from some military operation (Op. pp. 12-13).

It is submitted that this test is contrary to a proper application of the rule of the *Feres* and *Brooks* cases to property damage losses, contrary to administrative construction, and results in unjustly restricting claim rights of military personnel for property damage losses.

In the *Feres* case, this Court held that the *Brooks* case announced the rule that where a soldier was injured while on furlough or leave, "under compulsion of no orders or duty and on no military mission," his injury was not service incident, and was covered under the Tort Claims Act.[25]

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[25] It has been held that in determining whether a personal injury is service incident as regards the Tort Claims Act, the determining factor is the status of the soldier at the time of the injury, and not the locale or source of the injury (*e.g.*, whether on or off the base, or while using a government facility, while off duty):

Brown v. U. S. (S. D., W. Va.), 99 Fed. Supp. 685 (sailor on liberty pass killed while swimming in pool on navy base, held, not service incident);

Samson v. U. S. (S. D., N. Y.), *supra*, 79 Fed. Supp. 406 (soldier, off duty, injured while riding as a passenger in army bus on the base, held, not service incident);

Herring v. U. S. (Colo.), 98 Fed. Supp. 69.

Consistent with the foregoing, the Judge Advocates General of the services have ruled as to property damage claims of military personnel presented under these various claim statutes, including the Tort Claims Act, that where property of a soldier is damaged while located in a government facility on a base, the damage is not incident to service where the facility is being used by the soldier voluntarily for his own convenience, and not pursuant to military orders. For example, the following losses were held to be not incident to service: Army officer's car parked in a base parking lot where it was struck by an Army truck[26]; soldier, off duty, was driving his car on a base road, when it was struck by an Army truck[27]; Air Force personnel sent clothes to Air Force laundry where clothes were lost[28]; airman went swimming in base pool and checked his watch in Air Force checkroom where it was lost.[29] On the other hand, where an Army officer was driving his car off the base, on a change of station pursuant to orders authorizing travel by private conveyance, and the car was struck by an Army truck, the damage was held to be incident to service.[30]

Likewise consistent with the foregoing is *Lund v. U. S.* (Mass.) 104 Fed. Supp. 756 (cited in the Opinion with disapproval, p. 13) where recovery was per-

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[26] 2 *Bull JAG,* 274-275. (For this opinion, see para. 5(a), pp. 24-25, App. "B").

[27] 4 *Bull. JAG,* 62. (For this opinion, see para. 5(b), p. 25, App. "B").

[28] 1 *Dig. Ops.,* Claims, sec. 94.3, pp. 65-66. (For this opinion, see para. 5(c), pp. 25-27, App. "B").

[29] 2 *Dig. Ops.,* Claims, sec. 94.1, p. 64. (For this opinion, see para. 5(d), pp. 27-28, App. "B").

[30] 4 *Bull. JAG,* 287. (For this opinion, see para. 5(e), p. 29, App. "B").

mitted under the Tort Claims Act for damage to a naval officer's automobile caused by a naval plane, while the car was voluntarily parked in a base parking lot.

It is submitted that the foregoing establish that the correct rule as to property damage is that such damage is not incident to service, where, at the time of damage, the property is located in a government facility which the soldier is making use of voluntarily for his own convenience, and not pursuant to any military orders or while on a military mission.

The rule announced by the Opinion would result in making any property damage loss occurring on a base incident to service, since a soldier's property would always be "located on a military base solely by virtue of the active military service of the owner" and the entire area of every military base is "absolutely subject to military control and discipline." (Op. pp. 12-13.)

The right of a soldier to recover under the Tort Claims Act for property damaged by the negligence of the government should not be made to depend upon the wholly fortuitous circumstance of whether his property happens to be on or off the base at the moment of damage. For example, under the rule announced by the Opinion, if a soldier voluntarily parked his car in a base parking lot and an Army truck negligently ran into it, the soldier must go uncompensated for the damage;[31] whereas, if the car were parked a few feet away but outside the base limits, and the same accident occurred, the soldier could make claim for the damage under the Tort Claims Act.

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[31]According to the Opinion, he could not claim under the Tort Claims Act since the loss would be service incident; and, as noted above, motor vehicle damage such as this is excluded from coverage under the Military Personnel Claims Act.

It is submitted that both claims (and the claims in the instant cases) should be held to be not service incident, since the use of the parking lot (here, the trailer park) was voluntary and for the convenience of the personnel, and not pursuant to any military orders or in connection with any military mission.

B. The Administrative Allowance of the Uninsured Claims Under the Military Personnel Claims Act Is Not Here Controlling.

The Opinion holds that the administrative allowance of the uninsured claims of the soldiers under the Military Personnel Claims Act is conclusive that the damage was service incident, for the purpose of these suits brought under the Tort Claims Act, because the same accident and personnel were involved; and because the Military Personnel Claims Act provides that any "administrative determination" thereunder is final and conclusive for all purposes; and also because in the *Feres* case this Court announced "the principle of the exclusive character of federal plans for compensation." (Op. pp. 10-12.)

None of these grounds are tenable because—

(1) The two statutes are completely independent and an administrative determination under the Military Personnel Claims Act cannot serve to deprive the District Court of the power to exercise its independent judgment as to whether these claims are, in fact, service incident; furthermore, at the time of such administrative determination the insurance companies were the owners of the subrogated claims, and to deprive them of any right to be heard with respect to this issue would be in violation of the most elemental concept of due process.

(2) The Military Personnel Claims Act merely provides that the *"settlement"* (and not *the administrative*

determination of service incidence, as stated in the Opinion) is final and conclusive.

(3) The "principle of the exclusive character of federal plans for compensation," while applicable to some types of compensation statutes, is not here applicable in view of the express provision by Congress that the Military Personnel Claims Act was not the exclusive remedy for service incident property damage claims. (And see *U. S. v. Brown, supra,* 348 U. S. 110.)

Conclusion.

The questions of construction and coverage of the Tort Claims Act involved in these cases are of manifest importance. The *Feres* case dealt with a materially different problem, and to apply the rule of that case to property damage claims unquestionably results in a substantial restriction of claim rights of military personnel. It is respectfully submitted that the resolving of these questions is of such importance that it should receive the consideration and decision of this Court. The petition for writs of certiorari should be granted.

Los Angeles, California.

July 8, 1955.

Respectfully submitted,

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APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Preferred Insurance Company, a Corporation; Michigan Surety Company, a Corporation; Midstates Insurance Company, a Corporation; and The Mercantile Insurance Company of America, a Corporation, appellants, vs. United States of America, appellee. No. 13,889.*

May 9, 1955.

Appeal from the United States District Court, Northern District of California, Southern Division.

Before: HEALY and BONE, Circuit Judges, and BOLDT, District Judge.

BOLDT, District Judge.

Appellee's motion to dismiss Appellants' complaints for lack of jurisdiction was heard and considered on the allegations of the complaints, an affidavit supporting the motion and a written stipulation of facts. The motion was granted and these appeals are from the judgments of dismissal.

At 10:00 p.m. on August 5, 1950, an Air Force B-29 airplane crashed at the Fairfield-Suisun Air Force Base in California a few seconds after takeoff. The plane exploded near a trailer park on the Base extensively damaging 17 trailers and property therein owned and used for residence by enlisted men and officers in active duty status and assigned to the Base at the time. Appellant insurers in the several cases consolidated on this appeal,

*Consolidated on appeal with Nos. 14001 to 14005, inclusive.

pursuant to the terms of insurance policies issued to the owners of the trailers, paid them a total of $49,661 for the damage to the trailers. The insureds had no uninsured losses with respect to the fully insured trailers; however, other property damage was suffered by the insureds as a result of the same crash for which claims were submitted to the Air Force under the Military Personnel Claims Act of 1945, 31 U.S.C. 222c and paid, except for the property covered by insurance as provided by regulations under the Act.

The complaints, praying recovery against the United States in the amount referred to and asserting jurisdiction in the federal district court under the Federal Tort Claims Act, 28 U.S.C. 1346, alleged that the crash resulted from negligent maintenance and operation of the plane and that by payment of the insurance policy claims the insurers became subrogated to the rights of their respective insureds to the extent of the payments.

The stipulation of facts shows: The trailers were the private property of the servicemen and the government had no interest therein. There were not sufficient public quarters on the Base to house the personnel assigned to the Base and in the surrounding area there was a critical housing shortage. The owners of the trailers were free to live off the Base and could leave it on the same basis as other personnel, but for the convenience and accommodation of personnel and for the mutual benefit of personnel and the Air Force the trailer park on the Base was established. The trailer park was not required in the operation of the Base, no one was required to use it and those who did so made voluntary application at their discretion for permission to park their trailers therein. Personnel using the park were required to pay rental

to the government for the space assigned and also to pay for ultilities furnished. The servicemen using the trailer park were entitled to and drew regular quarters allowance paid to personnel not furnished government quarters and who lived off the Base. The owners of the damaged trailers had no duties whatever with respect to the maintenance, servicing, loading, operation, dispatch or control of the plane which crashed. At the time of the crash the owners of the trailers, while in active duty status and assigned to the Base, were variously located both on and off duty in the trailer park, at other places on the Base, in neighboring communities and at other military installations in the United States and overseas.

The stipulation further shows: Detailed procedures controlling the operation and maintenance of the trailer park within the confines of the Base were prescribed in a Base regulation. Only Air Force personnel and their families assigned to the Base were allowed to use the trailer park facilities. Specific assignments and termination of trailer space were made by the Base billeting officer. Assignment of trailer park space automatically terminated when the Base ceased to be the permanent station of the individual concerned. The trailer park was operated as a nonprofit activity, with occupants charged a monthly fee determined by the billeting officer and a council of park occupants appointed by the Base commander. Repairs and removal of government property could be made by Air Force installation personnel only. The trailer park area was under military protection and subject to the jurisdiction of military police. Each of the damaged trailers had been permanently placed in position by jacks or other means for the duration of the owner's permanent assignment to the Base.

In the District Court opinion, 111 Fed. Sup. 899, it was held that the property damage sustained by appellants' insureds was incident to their military service within the meaning of the Military Personnel Claims Act; that claim under said Act is the exclusive remedy of a serviceman for service incident property damage; and that neither servicemen nor their insurers by subrogation have a right of action under the Federal Tort Claims Act for property damage so sustained. The two general questions presented on this appeal are: (1) Can one in active military duty status maintain a claim against the United States under the Tort Claims Act for property damage occurring incident to military service? (2) Was the property damage for which subrogation recovery is sought in the present cases incident to the service of appellants' insureds?

In Brooks v. U. S., 337 U. S. 49 (1949) the Supreme Court held that a serviceman injured while on leave and away from his duty station by the negligent operation of an army truck driven by a civilian employee could maintain an action under the Federal Tort Claims Act. Thereafter in Feres v. U. S., 340 U. S. 135 (1950) the Court held:

> "We conclude that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." p. 146.

In Johansen v. U. S., 343 U. S. 427, 440 (1952) the Court said:

> "This Court accepted the principle of the exclusive character of federal plans for compensation in Feres v. United States, 340 U. S. 135. Seeking so to apply the Tort Claims Act to soldiers on active duty as

'to make a workable, consistent and equitable whole.' p. 139, we gave weight to the character of the federal 'systems of simple, certain, and uniform compensation for injuries or death of those in armed services.'" p. 144.

Recently both Feres and Brooks have been approved in U. S. v. Brown, 348 U. S. 110, 112 (Dec. 1954):

> "The Feres decision did not disapprove of the Brooks case. It merely distinguished it, holding that the Tort Claims Act does not cover 'injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.' 340 U. S. 135, 146. The peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the Court to read that Act as excluding claims of that character. . . . We adhere also to the line drawn in the Feres case between injuries that did and injuries that did not arise out of or in the course of military duty."

Since the rule of Feres denying action under the Tort Act for service incident personal injuries has been so emphatically reaffirmed, whether the same rule applies to service incident property damage claims will depend on whether or not the rationale of the Feres decision is valid as to such claims.

The Feres opinion, after pointing out considerations persuasive of liability under the language of the Tort Act, the inadequacy of legislative history and the un-

certainty or confusion created by the legislation, stated: "Under these circumstances, no conclusion can be above challenge, but if we misinterpret the Act, at least Congress possesses a ready remedy." p. 138. The decision was unanimous and in the more than four years since it was rendered Congress has not amended the Tort Claims Act. Accordingly, the opinion must be accepted as dispelling any doubt as to congressional intent in the adoption of the Act. The four general considerations cited in the opinion as supporting the decision are indicated by the following quotations:

(1) "This Act, however, should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole." p. 139.

(2) "The primary purpose of the Act was to extend a remedy to those who had been without; if it incidentally benefited those already well provided for, it appears to have been unintentional. Congress was suffering from no plague of private bills on the behalf of military and naval personnel, because a comprehensive system of relief had been authorized for them and their dependents by statute." p. 140.

(3) "One obvious shortcoming in these claims is that plaintiffs can point to no liability of a 'private individual' even remotely analogous to that which they are asserting against the United States. We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving." p. 141.

(4) "This Court, in deciding claims for wrongs incident to service under the Tort Claims Act, cannot escape attributing some bearing upon it to enactments by Congress which provide systems of simple, certain, and uniform compensation for injuries or death of those in armed services." p. 144.

Each of these considerations is as applicable to property damage incident to service as to personal injury incident to service.

The Military Personnel Claims Act of 1945, 59 Stat. 225, is a part of the statutory system of remedies against the government adopted by Congress. The Act provides a remedy for personal property loss or damage by service personnel sustained incident to their service, which is considerably more liberal, adequate and satisfactory than any of its predecessor acts over a period of many years.[1]

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[1]The House and Senate Committees on Claims, reporting favorably on the bill which became the Act, stated:

"The purpose of the proposed legislation is to provide a single, clear, definite, and workable statute for the settlement of claims of military personnel and civilian employees of the War Department or of the Army for the loss of their personal property incurred while in the service and to repeal certain statutes which have been found to be obsolete or unworkable and not appropriate to present conditions." (H. Rept. 237, 79th Cong., 1st Sess., p. 1; S. Rept. 276, 79th Cong., 1st Sess., p. 2; see 91 Cong. Rec. 1540, 3990, 4690.

As noted by the court below, the 1945 Act completed the original plan for consolidation into three separate statutes of all of the statutory settlement provisions affecting the Armed Forces. H. Rept. 237, 79th Cong., 1st Sess., p. 3; S. Rept. 276, 79th Cong., 1st Sess., p. 3. The first two statutes, the Foreign Claims Act (57 Stat. 666) and the Military Claims Act (57 Stat. 374), were enacted in 1943. In referring to these two statutes and the need for enacting H. Rept. 2068 as the third and final statute, Secretary of War Patterson pointed out (H. Rept. 237, 79th Cong., 1st Sess., p. 4):

"By the passage of the act of April 22, 1943 (57 Stat. 66), commonly referred to as the Foreign Claims Act, the Congress

While the legislation preceding the Military Personnel Claims Act provided compensation for service incident property damage, not any of the previous acts created a *right of action* in the serviceman or *liability* on the government even for damage caused by negligence of a government agent or employee.[2] Payment of claims under

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made available to the War Department a thoroughly satisfactory and workable basis for the settlement of claims for damages caused by our armed forces in foreign countries.

"The next forward step came with the passage of the act of July 3, 1943, which consolidated all then existing statutory provisions for the administrative settlement of claims other than claims under the Foreign Claims Act and claims of War Department and Army personnel.

"The only field of statutory authorization with respect to military claims which has not been modernized to meet present conditions is that covering the claims of military personnel and civilian employees of the War Department or of the Army for damage to or loss, destruction, capture, or abandonment of personal property occurring incident to their service. Fair, just, and prompt administrative processing of these claims is of paramount importance, especially in time of war. The manner in which such claims are handled and the length of time required to effect payment or other final action has a direct effect upon morale in the Army and upon relatives and friends on the home front. At the present time, members of our armed forces and civilian employees of the War Department or of the Army stationed in all parts of the world are continuously subjected to hazards which result in loss, damage, or destruction of their personal property. It has become apparent that there is urgent need for new legislation to effect a fair, equitable, and uniform basis for the settlement of such claims.

"Enactment of the enclosed bill would make possible the settlement by disapproval, replacement in kind, or payment in money, of claims for damage to or loss, destruction, capture, or abandonment of personal property coming within the provisions thereof to be effected, after appropriate investigation and recommendation, by the Secretary of War, with power to delegate such authority in appropriate classes of cases and under applicable Army regulations."

[2]The Military Personnel Claims Act of March 3, 1885, 23 Stat. 350; The "Gunfire Act" of August 24, 1912, 37 Stat. 586; The Military Personnel Claims Act of July 9, 1918, 40 Stat. 880; The Military Personnel Claims Act of March 4, 1921, 41 Stat. 1436; The Small Tort Claims Act of December 28, 1922, 42 Stat. 1066; The Military Claims Act of July 3, 1943, 57 Stat. 372.

all of the property claim acts has been a matter not of right but of grace resting in administrative discretion. None of the acts provided for judicial review of findings or action on claims. There never has been and is not now any act of Congress, unless it be the Tort Claims Act, authorizing a serviceman in active duty status to sue the government for service incident property damage, however inflicted.

As appears from the allowance and payment of claims under the Military Personnel Claims Act by appellants' insureds in these very cases, Congress has provided a simple, certain and uniform method of compensation for service incident property damage. This system avoids the serious disruption of military mission and discipline that well might follow civil litigation based on such claims.

We consider every essential element on which the Feres rule was based fully applicable to service incident property damage claims and therefore hold that Congress did not intend a serviceman in active duty status to have a right of action against the government under the Tort Claims Act for property damage occurring incident to his military service.

An insurer may sue under the Tort Claims Act upon a claim to which it has become subrogated by payment of a claim to an insured who would have been able to bring such action. U. S. v. Aetna Casualty & Surety Co., 338 U. S. 366. However, "one who rests on subrogation stands in the place of one whose claim he has paid" and "it is elementary that one cannot acquire by subrogation what another whose rights he claims did not have." U. S. v. Munsey Trust Co., 332 U. S. 234, 242. In the light of these principles we now consider whether the damage to the trailers of appellants' insureds under the particu-

lar circumstances of these cases was sustained incident to the military service of the insured.

Under the Military Personnel Claims Act, 59 Stat. 225, the Secretary of the Air Force and those officers designated by him for the purpose are authorized to "consider, . . . determine, . . . and pay any claim not in excess of $2,500 against the United States, . . . of military personnel . . . when . . . the property [is] determined to be reasonable, useful, necessary, or proper under the attendant circumstances, . . . for damage to or loss, . . . of personal property occurring incident to their service, . . . *Provided,* That the damage to or loss, . . . of property . . . shall not have occurred at quarters occupied by the claimant within the continental United States (excluding Alaska) which are not assigned to him or otherwise provided in kind by the Government." There is no definition of "incident to service" in the Act or in the Air Force regulations authorized by the Act but the regulations list a variety of examples of allowable and nonallowable claims. 32 C. F. R. 836.92-3.

The allowance and payment of the claims made under such Act by appellants' insureds for damage to personal property, other than the trailers, sustained in the same trailer park and as a result of the same airplane crash, must be presumed to have been based on an administrative determination that the property damage occurred "incident to service" since such is a requirement of the Act and regulations for allowable claims. The Act does not provide for judicial review of administrative action on claims; but even if it did, administrative findings of fact would have to be accepted by a court unless arbitrary, capricious or without evidentiary support. U. S.

v. Babcock, 350 U. S. 328; Dismuke v. U. S., 297 U. S. 167; Stark v. Wickard, 321 U. S. 288.

Inasmuch as the damage to the personal property for which claim was made under the Military Personnel Claims Act and the damage to the trailers for which claim is made under the Tort Claims Act in these cases was sustained by the same military personnel in the same accident, at the same time and place, and under identical conditions, there would be no factual or legal basis for holding the one service incident and the other not, unless the term "incident to service" has a different meaning under the Tort Claims Act than it has under the Military Personnel Claims Act. This is without regard either to the effect of the language in the Military Personnel Claims Act making the administrative determination "final and conclusive for all purposes, notwithstanding any other provision of law to the contrary" or to "the principle of the exclusive character of federal plans for compensation in Feres v. United States" as stated in Johansen and which has been applied by the Seventh Circuit in Sasse v. U. S., 201 F. 2d 871, and by the District of Columbia Court of Appeals in Lewis v. U. S., 190 F. 2d 22, to the Federal Employees Compensation Act in relation to claims asserted under the Tort Claims Act. Feres bars action under the Tort Claims Act for injuries "arising out of or incident to service"; the Military Personnel Claims Act authorizes claims for damage to property "occurring incident to service." It may be that "arising out of" has a broader meaning than "incident to" although both appear to be different ways of saying the same thing. In any event, there is no logical basis or practical reason under the facts of the instant cases for holding that damage to the trailers could have been non-service incident while the simultaneous damage to the

other property of the same servicemen under identical circumstances was incident to their service.

Entirely aside from the filing of the claims by appellants' insureds under the Military Personnel Claims Act and the action taken thereon, the allegations of the complaints and the stipulated facts clearly show that the damage to the trailers of the servicemen arose out of and was in the course of activity incident to their military service.

At the time of the damage the trailer owners were all in active military duty status as distinguished from civilian or inactive military status. The trailers were permanently set up on land inside the Base in spaces specifically assigned by the Base billeting officer in an area absolutely subject to military control and discipline. The trailers were authorized to occupy the assigned spaces solely by virtue of the active military status of their owners. The fact that a serviceman be on furlough or leave may be material to whether his personal injuries be service incident or not according to where he is and what he is doing at the time of injury. In itself furlough or leave has no bearing on whether a serviceman's property be damaged incident to his military service. In the present cases, whether the owners of the trailers were on furlough or not is unimportant since the trailers were on the military base at the place of damage only because the owners were in active military duty status. The damage to the trailers resulted directly from the flight of an Air Force airplane operated in the course of military service. The crash of an airplane immediately following takeoff from an Air Force base certainly has a real and substantial relationship to the military service of any serviceman assigned to such base whether or not he has any

direct part in the maintenance or operation of the particular plane. If, as in these particular cases, at the time of damage the personal property of a serviceman is located on a military base solely by virtue of the active military service of the owner, and the damage results directly from operations in military service, we hold that the damage does arise out of and occurs in the course of activity incident to the military service of the owner.

Lund v. U. S., 104 Fed. Supp. 756 (D. C. Mass. 1952) is the only cited case involving property damage which on essential facts similar but not identical to those of the present cases is to the contrary of our holdings herein. The opinion in that case acknowledges the difficulty of the problem which it disposes of in a few sentences and without persuasive analysis.

The judgments are affirmed.

(Endorsed): Opinion. Filed May 9, 1955. Paul P. O'Brien, Clerk.

United States Court of Appeals for the Ninth Circuit.

Preferred Insurance Company, a Corporation; Michigan Surety Company, a Corporation; Midstates Insurance Company, a Corporation; and The Mercantile Insurance Company of America, a Corporation, appellants, vs. United States of America, appellee. No. 13,889.

JUDGMENT.

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed): Judgment. Filed and Entered: May 9, 1955. Paul P. O'Brien, Clerk.

United States Court of Appeals for the Ninth Circuit.

Fidelity-Phoenix Fire Insurance Company of New York, appellant, vs. United States of America, appellee. No. 14,001.

JUDGMENT.

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed): Judgment. Filed and Entered: May 9, 1955. Paul P. O'Brien, Clerk.

United States Court of Appeals for the Ninth Circuit.

Albert G. Whipple, appellant, vs. United States of America, appellee. No. 14,002.

JUDGMENT.

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed): Judgment. Filed and Entered: May 9, 1955. Paul P. O'Brien, Clerk.

United States Court of Appeals for the Ninth Circuit.

George Stropeck, appellant, vs. United States of America, appellee. No. 14,003.

JUDGMENT.

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed): Judgment. Filed and Entered: May 9, 1955. Paul P. O'Brien, Clerk.

United States Court of Appeals for the Ninth Circuit.

Government Employees Insurance Company, appellant, vs. United States of America, appellee. No. 14,004.

JUDGMENT.

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed): Judgment. Filed and Entered: May 9, 1955. Paul P. O'Brien, Clerk.

United States Court of Appeals for the Ninth Circuit.

St. Louis Fire & Marine Insurance Company, appellant, vs. United States of America, appellee. No. 14,005.

JUDGMENT.

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed): Judgment. Filed and Entered: May 9, 1955. Paul P. O'Brien, Clerk.

APPENDIX B.

(Opinions of Judge Advocates General (JAG)).

1. *Opinion of JAG re Gunfire Act of 1912.*

In *Digest of Opinions, Judge Advocate General of the Army,* 1912-1940, Sec. 709, page 449 (Opinion No. 18-463, 8/31/14), it appeared that an army officer occupied government quarters at West Point, and that heavy artillery practice caused a china closet in his quarters to fall, thus breaking his china and glassware valued at $620. The loss was held to be "in the service" under the Military Personnel Claims Act of 1885, but within one of the exclusions thereof, since the articles were of an expensive nature. The Judge Advocate General ruled that the claim was, however, covered under the Gunfire Act of 1912, *supra:*

> *"Held,* That from the unusually expensive character of the articles destroyed, they could not be considered such as the Secretary of War should determine to be reasonable, useful, and necessary for the officer in service while in quarters, within the meaning of the act of March 3, 1885 (23 Stat. 350) but that the claim might be adjusted and reported to Congress for appropriation[1] under the provisions of the act of August 24, 1912 (37 Stat. 586), as a loss of private property not exceeding $1,000 in value occasioned by heavy gunfire and target practice of troops, *the act of applying to losses*

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[1]Since the opinion was written in 1914 and the Digest was not published until 1940, it may be assumed that over the years Congress appropriated the money for payment of this and similar claims.

of private property of officers residing upon military reservations as well as to losses of the property of civilians."

2. *Opinion of JAG re Small Tort Claims Act of 1922.*

(a) "If the loss of private property of an officer while in storage is due to the negligence of any officer or enlisted man, though not payable under the act of March 4, 1921 (Military Personnel Claims Act of 1921) (41 Stat. 1436), under the Comptroller's rulings, the amount may be certified to Congress under the act of December 28, 1922 (42 Stat. 1066)." 332.32, May 21, 1926, *Digest of Opinions, Judge Advocate General of the Army,* 1912-40, p. 456, Sec. 713.

(b) "Claim for loss of baggage. Claimant, an Army officer, was ordered from a station in the continental United States to one in the Canal Zone. After the effective date of his orders and after his compliance with them the baggage in question was purchased by third parties as a wedding present for claimant and shipped to him by Army transport. It was lost in transit. Claim disallowed. Held: Baggage purchased after the effective date of change of station orders may not be included in the authorized change of station allowance of baggage and its loss in transit is not reimbursable under the act of Mar. 4, 1921, as implemented by AR 35-7100. However, if such a loss is due to the negligence of Government employees, relief may be had under the act of Dec. 28, 1922, as implemented by AR 35-7070." SPJGD, 1942/5773, Nov. 25, 1942, 1 *Bull. JAG*[2] 331.

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[2]The reference is to Bulletins, Judge Advocate General of the Army.

3. *Opinions of JAG re Military Claims Act of 1943, as Amended by the Military Personnel Claims Act of 1945.*

(a) "Hereafter follow the first decisions under the new regulations (A. R. 25-100, 29 May, 1945), interpreting the act of 29 May, 1945. Any decision on claims of military personnel or civilian employees which has heretofore appeared in the Digests or Bulletins should be carefully examined as to its applicability under the new statute and regulations before it may safely be regarded as authoritative. SPJGD/D-39091, 31 July, 1945.

"Scope.—Claim for damage to automobile. Claimant, an Army officer, while traveling in his automobile pursuant to temporary duty orders, suffered property damage as the result of the negligence of an Army truck driver acting within the scope of his employment. The claim had been disapproved for the sole reason that *the damage occurred incident to claimant's service,* and, therefore, could not be favorably considered under the provisions of the act of 3 July, 1943 (57 Stat. 372). The claim was considered under the provisions of the act of 3 July, 1943, as amended by sec. 4 of the Military Personnel Claims Act of 1945 (approved 29 May, 1945), and was allowed. *Held: The Military Personnel Claims Act of 1945 has repealed the prohibition contained in the act of 3 July, 1943, against the payment of claims of military personnel and civilian employees of the War Department or the Army for damage to or loss or destruction of property occuring incident to their service* * * * The claim, being in all other respects within the provisions of the act of 3 July, 1943, is now payable." SPJGD/D-36478, 31 July, 1945, 4 *Bull. JAG* 287.

(b) "Secs. 1, 2, act of 3 July, 1943 (57 Stat. 372); Sec. 4, act of 29 May, 1945 (Pub. Law 67, 79th Cong. 59 Stat. 225); 31 U. S. C. 223b, 223c.

"Scope of act.—Claim for loss of property delivered to an Army hospital. Claimant deposited with proper military authorities in the hospital French francs worth $321.20 * * * He was given a receipt, but the property was never returned to him * * * The claim was filed under AR 25-100 (Military Personnel Claims Act), but was considered under the provisions of AR 25-25 (Military Claims Act), since, in the absence of special circumstances not shown in this case, money claims under AR 25-100 will be limited to $100 or one month's pay, whichever is greater. Claim approved for $321.20. Held: The delivery of the French francs to authorized military personnel constituted a bailment to the Government. The claim is therefore payable without regard as to the cause of the loss. The limitation of $100 or one month's pay as applied to claims under AR 25-100 is not controlling in claims settled under AR 25-25. * * *" SPJGD/D-186805, 2 February, 1946; SPJGD/D-202385, 4 April, 1946, 5 *Bull. JAG* 68.

4. *Opinions of JAG re Tort Claims Act.*

In reading the following opinions, it should be noted that AFR refers to Air Force Regulations, AFR 112-3 dealing with claims under the Military Claims Act of 1943, AFR 112-4 dealing with claims under the Tort Claims Act, and AFR 112-7 dealing with claims under the Military Personnel Claims Act of 1945.

(a) "Although par. 3(b)(5), AFR 112-7, provides for reimbursement for currency only in specific and limited circumstances, in proper cases such claims

may be approved under any of the categories enumerated in par. 3 of this regulation, except when a determination is made that they are barred by par. 5a, or involve transportation losses (par 3b (2)). Money last (stolen) while traveling under orders is not considered reimbursable in view of EO 10053 and AFR 75-30 (5 Bull. JAG 98). *Prior to the enactment of the Federal Tort Claims Act certain claims for money losses were considered cognizable under the Act of July 3, 1943, when not payable under the Military Personnel Claims Act (par. 15), but since then such claims may be cognizable under either act, depending upon the factual situation involved.* For example, a claim for money deposited at an Army hospital was presented by a soldier patient but since the amount involved exceeded the amount determined to be reasonable under the regulation, payment was made under the Act of July 3, 1943 (5 Bull. JAG 68). Accordingly, there is a marked distinction between the items of property for which payment may be made under AFR 112-3, AFR 112-4 and AFR 112-7, inasmuch as the Military Personnel Claims Act and AFR 112-7 limits the type and kind of property claims that may be presented thereunder (par. 3, AFR 112-7), whereas no such restrictions are now contained in either of the other acts (par. 15, AFR 112-3; par. 15, AFR 112-4)." Op. JAGAF 1952/18, 11/19/51, 1 *Dig. Ops.*, Sec. 95.7 (Claims), p. 71.

(b) "Sec. 95.5 Motor vehicles.

The claimant was assigned government quarters in a building on an air base and was authorized to park

his car in a basement garage below. A fire of 'unknown' origin broke out in the basement of this building. As a result, the claimant's automobile was destroyed to such an extent that it would have to be sold for salvage and a set of golf clubs and a golf bag stored in the car were damaged to such an extent that they were of no further use to the claimant. In addition, clothing located in the claimant's quarters above the garage were damaged by smoke, necessitating dry cleaning. HELD: The claim for the loss of the automobile and golf equipment is cognizable but not payable under AFR 112-3 and the Act of July 3, 1943 (57 Stat. 372; 31 U. S. C. 223b), for the reason that the property was not bailed to the government at the time of the loss. While claimant was permitted to park his car in the garage, it was for his own convenience and at his own risk, except for loss or damage caused by the negligent or wrongful act or omission of employees of the Government while acting within the scope of their employment (38 Am. Jur. 767). *But no evidence of tort liability was adduced (28 U. S. C. 2672 (Tort Claims Act))* and such a loss was not incident to 'noncombat activities' within the meaning of AFR 112-3, par. 4e (7 Bull. JAG 193). Moreover, that part of the claim covering the automobile and the golf equipment which was in the automobile at the time of the fire, is not payable under the Military Personnel Claims Act of 1945 (31 U. S. C. 222c) and AFR 112-7, as the property was not destroyed 'at quarters' or while in government 'custody' (par. 3b(1), AFR 112-7). Furthermore, claims for motor vehicles are ordinarily not paid under such Act and claimant's loss does not fall within the exception pro-

vided (par. 3b(4) and 4g, AFR 112-7). However, that part of the claim for the cost of dry cleaning of claimant's clothing is approved, in accordance with the provisions of the Military Personnel Claims Act of 1945 and AFR 112-7, par. 3b(1), even though the cost for such dry cleaning is not substantiated by a receipted bill, as the claim appears credible." Op. JAGAF 1951/100, 26 July 1951, 1 *Dig. Ops.*, Sec. 95.5, p. 70 (Claims).

(c) *"Sec. 93.9. Fire, flood, or other serious occurrence.*

The claimant occupied assigned quarters at an Air Force Base in the Canal Zone. The wooden wall cabinet in the kitchen of his quarters suddenly fell away from the wall, thereby breaking the china and glassware stored in the cabinet, as well as articles on the drainboard beneath the cabinet. The facts showed that the cabinet had been anchored to the wall with four nails near its base when installed several years before; however, inspections during use had not revealed any defects. Moreover, the overloading of the cabinet appears to have been a contributing factor in the accident. *Held:* Claim for the loss of personal property is disapproved because the property was not damaged or destroyed by 'fire, flood, hurricane or other serious occurrence' while located in assigned quarters (par. 3b(1), AFR 112-7, 15 February 1950). In this connection, the occurrence that caused the damage is not the type of incident that is considered to be a serious occurrence because it has been construed to mean an occurrence similar in character to those specifically mentioned, *i. e.*, typhoon, cloudburst, earthquake, explosion, etc.

(7 Bull. JAG 89). Furthermore, although the Military Personnel Claims Act of 1945, as amended, and AFR 112-7, no longer limits recovery to *rigid categories* of claims enumerated therein, and any claim falling within the general statutory provisions thereof, not specifically excluded by statute or regulation, may be submitted for consideration and in proper cases approved for payment, *this claim does not appear to be the type of 'meritorious' claim that falls within the spirit of the statute* (par. 3a, AFR 112-7), *because recovery is predicated solely on the negligent or wrongful act or omission of government employees. Accordingly, in the continental United States and its territorial possessions, including the Canal Zone, the Federal Tort Claims Act and AFR 112-4 are preemptive in such circumstances (28 U. S. C. 2671-80).* However, in either event, the overloading of the cabinet would constitute negligence and thus preclude payment of the claim (par. 7, AFR 112-4 and par. 4L, AFR 112-7)." Op. JAGAF 1952/83, 12 September 1949, 2 *Dig. Ops.*, Sec. 93.9, p. 63 (Claims).

5. *Opinions of JAG as to whether property damage is service incident.*

(a) "Act of 3 July 1943 (Military Claims Act).

* * * * * * * *

"Claim for damage to a privately owned car of an Army officer. Claimant's car was properly parked on an Army parking lot provided for officers of the station complement. It was struck in the rear by an unidentified vehicle which left traces of olive drab paint and an indentation of the same measurements as the bumper on Army vehicles. Claim

allowed. Held: It may be inferred, from the nature of the damage and the fact that few persons other than military personnel and civilian employees are permitted to enter a military reservation during the present emergency, that claimant's car was damaged by a person operating an Army vehicle within the scope of his employment. The damage in the present case may not be considered incident to the claimant's service, and therefore recovery is not barred by Sec. 1 of the act." SPJGD 1943/D-8458, 21 July 1943. (2 *Bull.* JAG, 274-5)[8]

(b) "Claim for damage to an automobile. A Government vehicle in an access road on an Army post had stopped to discharge passengers. Claimant, a soldier not on duty, drove his privately-owned car up behind the Army truck and stopped at an improper parking place to permit a passenger to alight. The Army driver backed out of the access road and struck claimant's car. Claim approved. Held: The sole cause of the damage was the negligence of the Army driver in backing without keeping a proper lookout to assure himself that the movement could be made in safety. Claimant's stopping his vehicle did not constitute negligence, and the property damage was not incident to claimant's service." SPJGD/D-43824, 20 November 1944. (4 *Bull. JAG,* 62.)

(c) "An officer turned over his laundry, including two Air Force type shirts, to an air base laundry within the United States for laundering. Upon picking up his laundry he discovered that the two shirts had not been returned, and in their place he had received two shirts belonging to another. These

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[8]This claim arose during the 1943-5 period when service incident property damage claims were excluded from coverage under the Military Claims Act of 1943.

shirts were returned to the laundry, which activity was unable to locate the officer's shirts, or adjust the loss pursuant to USAF laundry regulations which, in such cases, authorizes only repair or replacement from overages (AFR 148-1, par. 17b).

"HELD THAT:

—the claim is not cognizable or payable under the Military Personnel Claims Act of 1945, as amended (59 Stat. 225; 31 USC 222c) and AFR 112-7, inasmuch as such losses have historically been considered as not incident to a claimant's service, because laundry regulations provide that the use of such an Air Force "proprietary" facility is a courtesy to officers and other individuals (including airmen, in cases involving non-Government clothing) who are authorized to avail themselves of the privileges thereof (AFR 148-1, par. 17b (2)(d)).

* * * * * * * *

"—the claim would be cognizable under the provisions of 28 USC 2671-80 and AFR 112-4, if the loss of the property was caused by the negligent or wrongful act or omission of any employee of the Air Force while acting within the scope of his office or employment and was not merely lost due to a fire of "unknown" causes, an "act of God," a criminal act, etc. (28 USC 2672; AFR 112-4; 6 Am. Jur., Bailments §185; 7 Bull JAG 88; 2 Dig JAGAF 557). However, this claim would not be cognizable under AFR 112-3 if it is found from the evidence that the claim is cognizable under 28 USC 2671-80, in view of the partial repeal of the Act of 3 July 1943 (31 USC 223b) by the Federal Tort Claims Act (par. 3b AFR 112-3). But, in foreign countries the Act of July 3, 1943 would be applicable, in such circumstances. Accordingly, if the investigation disclosed that the

claimant's shirts were negligently delivered to another individual. (Bailments, 185; 7 Bull. JAG 88; 2 Dig. JAGAF 557). However, this by USAF personnel, as alleged and could not be recovered, the claim would be payable pursuant to the provisions of 28 USC 2671-80 and AFR 112-4, except for the laundry service charge paid for cleaning the shirts, as this is not a proper element of damages (AFR 112-2, par. 6b).

"—the above opinion applies equally as well to all USAF activity cases of a similar nature, whether the individual claimant be an officer, airman or civilian. If it is the former, an airman's claim should be adjudicated on the same basis as an officer's or civilian's claim and the negligent or wrongful act or omission of an employee of the Air Force while acting within the scope of his office or employment, must be shown before the claim may properly be approved for payment under applicable statutes and regulations (AFR 112-3; AFR 112-4; AFR 148-1)." Op. JAGAF 1951/97. 30 July 1951. 1 *Dig. Ops.,* Claims sec. 94.3, pp. 65-6.

(d) "An airman delivered his wristwatch and several other valuables to a Japanese civilian attendant in the checkroom at an Air Force Base swimming pool in occupied Japan and was issued identification receipts therefor. The checkroom was operated as an adjunct to the pool and was authorized by the commanding officer through Special Services. The Japanese attendants were employees of the Air Force but due to the fact that Japan was an occupied country they were paid by the Japanese government. A sign indicated that valuables would be received for checking and it was customary for patrons to check their valuables but no charge was made therefor. When the airman returned for his property about four hours later the watch could not be located

nor its loss accounted for. *Held:* This claim is not cognizable under the Military Personnel Claims Act of 1945 (59 Stat. 225; 31 USC 222c), as amended, and AFR 112-7, inasmuch as the loss was not incident to the airman's service because he was using the facility for his convenience and pleasure while off duty (3 Dig. JAGAF, par. 21). However, the claim is cognizable under the Act of 3 July 1943, as amended (57 Stat. 372; 31 USC 223b), and AFR 112-3. Accordingly, the fact that the Japanese attendants were paid by the Japanese government is not controlling since volunteer workers, and others, have been construed to be Air Force employees within the meaning of this regulation, even though serving without compensation. Hence, such persons are not in the same category as nonappropriated fund employees, such as those engaged in exchange service activities. Thus a bailment to the Air Force resulted when the airman delivered his watch to the checkroom employees authorized to receive valuables. No negligence of the claimant or assumption of risk by him was involved. Therefore, since the loss occurred in a foreign country, the claim is payable under the provisions of AFR 112-3 because the loss was *caused* by Air Force employees, which acting within the scope of their employment, inasmuch as the failure to return or account for the loss of the bailed property on demand established a *prima facie* case of liability or presumption of negligence under the law of bailments, which was not rebutted by the Air Force (6 Am. Jur. Bailments §§208, 209, 222). [*Note:* This opinion supersedes the opinion reported as Op. JAGAF 1950/72, 7 June 1950, 2 Dig. JAGAF, par. 285.]" Op. JAGAF 1953/8. 4 February 1952. (2 *Dig. Ops.*, Claims, sec. 94.1, p. 64.)

(e) "Claim for damage to automobile. Claimant, an Army officer, while traveling in his automobile pursuant to temporary duty orders, suffered property damage as the result of the negligence of an Army truck driver acting within the scope of his employment. The claim had been disapproved for the sole reason that *the damage occurred incident to claimant's service,* and, therefore, could not be favorably considered under the provisions of the Act of 3 July, 1943 (57 Stat. 372). The claim was considered under the provisions of the act of 3 July, 1943, as amended by sec. 4 of the Military Personnel Claims Act of 1945 (approved 29 May, 1945), and was allowed. *Held: The Military Personnel Claims Act of 1945 has repealed the prohibition contained in the Act of 3 July, 1943 against the payment of claims of military personnel and civilian employees of the War Department or the Army for damage to or loss or destruction of property occurring incident to their service* * * *. The claim, being in all other respects within the provisions of the Act of 3 July, 1943, is now payable."[4] SPJGD/D-36478, 31 July, 1945, 4 *Bull. JAG* 287.

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[4]The claim was not payable under the Military Personnel Claims Act because of the exclusion of motor vehicle damage therein.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	5
Argument	9
Conclusion	17

CITATIONS

Cases:

Allen v. *D. D. Skousen Const. Co.*, 55 N. Mex. 1	12
Archer v. *United States*, 217 F. 2d 548, certiorari denied, 348 U.S. 953	14
Brooks v. *Dewar*, 313 U.S. 354	15
Brooks v. *United States*, 337 U.S. 49	9, 10, 13
Feres v. *United States*, 340 U.S. 135	9, 10, 11, 13
Fleming v. *Mohawk Co.*, 331 U.S. 111	15
Great Lakes Corp. v. *S.S. Co.*, 301 U.S. 646	16
Grimley, In re, 137 U.S. 147	14
Hartford Accident & Indemnity Co. v. *Cardillo*, 112 F. 2d 11, certiorari denied, 310 U.S. 649	12
Jefferson v. *United States*, 178 F. 2d 518, affirmed *sub nom. Feres* v. *United States*, 340 U.S. 135	11, 14
Lund v. *United States*, 104 F. Supp. 756	14
Martin v. *Mott*, 12 Wheat. 19	14
National Garment Co. v. *New York, C. & St. L. R. Co.*, 173 F. 2d 32	16
O'Leary v. *Brown-Pacific-Maxon*, 340 U.S. 504	12
P. Dougherty Co. v. *United States*, 207 F. 2d 626, certiorari denied, 347 U.S. 912	14
Phoenix Ins. Co. v. *Erie Transportation Co.*, 117 U.S. 312	16
Ritzman v. *Trent and the United States*, 125 F. Supp. 664	14
United States v. *Brown*, 348 U.S. 110	9, 10, 13

Cases—Continued Page

Wallis v. *United States*, 126 F. Supp. 673..... 14
Wilson Cypress Co. v. *Miller*, 157 Fla. 459..... 12
Zoula v. *United States*, 217 F. 2d 81..... 14

Statutes:

Act of July 3, 1952, 66 Stat. 321..... 3
Act of August 1, 1953, 67 Stat. 317..... 3

Military Personnel Claims Act of 1945 (59 Stat. 225):

Sec. 1 ..... 3, 14
Sec. 2 5
Sec. 3 5
National Security Act of 1947 (61 Stat. 495, 501, 503; 5 U.S.C. 626) 3
28 U.S.C. 1346(b) 2

Miscellaneous:

32 C.F.R. 836.93 (i) and (j)..... 15
18 Comp. Gen. 203 (1938)..... 16
H.R. 404, 82d Cong., 2d sess. 15
S. Rept. 1691, 82d Cong., 2d sess., p. 3..... 15

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 222

PREFERRED INSURANCE COMPANY, a corporation, MICHIGAN SURETY COMPANY, a corporation, MID-STATES INSURANCE COMPANY, a corporation, and THE MERCANTILE INSURANCE COMPANY OF AMERICA, a corporation, PETITIONERS

v.

UNITED STATES OF AMERICA

AND FIVE CONSOLIDATED CASES

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the Northern District of California is reported at 111 F. Supp. 899 (R. 22-37), *sub nom. Fidelity-Phenix Fire Insurance Co.* v. *United States.* The opinion of the Court of Appeals for the Ninth Circuit (R.

49-58) is reprinted as Appendix A to the Petition and is not yet reported.

JURISDICTION

The judgments of the court of appeals were entered on May 9, 1955 (R. 59-64). The petition for writs of certiorari was filed on July 11, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Tort Claims Act authorizes recovery for property damage sustained by a member of the armed forces incident to his service as the result of the alleged negligence of other military personnel and accordingly furnishes a basis for an insurer's claim based on subrogation.

STATUTES INVOLVED

1. Section 1346(b) of Title 28 U.S.C. (part of the Federal Tort Claims Act) provides:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the

> United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

2. The Military Personnel Claims Act of 1945 provides in pertinent part (59 Stat. 225): [1]

> SEC. 1. The Secretary of War, and such other officer or officers as he may designate for such purposes and under such regulations as he may prescribe, are hereby authorized to consider, ascertain, adjust, determine, settle, and pay any claim against the United States, including claims not heretofore satisfied arising on or after December 7, 1939, of military personnel and civilian employees of the War Department or of the Army, when such claim is substantiated, and the property determined

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[1] The Military Personnel Claims Act was amended, subsequent to the crash which gave rise to the instant claims, on July 3, 1952 (66 Stat. 321) and on August 1, 1953 (67 Stat. 317). The first amendment expressly extended the Act to Air Force personnel claims. The 1953 amendment enlarged the time for filing of certain claims.

At the time of the crash and before the 1952 amendment making the Military Personnel Claims Act expressly applicable to claims by Air Force personnel, the functions of the War Department with respect to Air Force personnel claims under the Military Personnel Claims Act had been transferred to the Secretary of the Air Force by the National Security Act of 1947 (61 Stat. 495, 501, 503; 5 U.S.C. 626). That Act changed the title of the Secretary of War to Secretary of the Army and created the Department of the Air Force and its head, the Secretary of the Air Force. It also provided for the transfer of appropriate functions from the Secretary of the Army to the Secretary of the Air Force (61 Stat. 503).

to be reasonable, useful, necessary, or proper under the attendant circumstances, in such manner as the Secretary of War may by regulation prescribe, for damage to or loss, destruction, capture, or abandonment of personal property occurring incident to their service, or to replace such personal property in kind: *Provided,* That the damage to or loss, destruction, capture, or abandonment of property shall not have been caused in whole or in part by any negligence or wrongful act on the part of the claimant, his agent, or employee, and shall not have occurred at quarters occupied by the claimant within continental United States (excluding Alaska) which are not assigned to him or otherwise provided in kind by the Government. No claim shall be settled under this Act unless presented in writing within one year after the accident or incident out of which such claim arises shall have occurred: *Provided,* That if such accident or incident occurs in time of war, or if war intervenes within two years after its occurrence, any claim may, on good cause shown, be presented within one year after peace is established. Any such settlement made by the Secretary of War, or his designee, under the authority of this Act and such regulations as he may prescribe hereunder, shall be final and conclusive for all purposes, notwithstanding any other provision of law to the contrary.

SEC. 2. Such appropriations as may be re-

quired for the settlement of claims under the provisions of this Act are hereby authorized. Appropriations available to the War Department for the settlement of claims under the provisions of the Act of March 3, 1885 (23 Stat. 350), as amended, shall be available for the settlement of claims under the provisions of this Act.

SEC. 3. Sections 3483-3488 of the Revised Statutes (31 U.S.C. 209-214), and the Act of March 3, 1885 (23 Stat. 350), as amended by the Act of July 9, 1918 (40 Stat. 880), and by the Act of March 4, 1921 (41 Stat. 1436; 31 U.S.C. 218-222), and by section 6 of the Act of July 3, 1943 (57 Stat. 374; 31 U.S.C. 222a, 222b), are hereby repealed.

STATEMENT

Petitioners filed these six suits under the Federal Tort Claims Act to recoup the proceeds of property damage policies paid by them to certain insured servicemen whose house trailers had been damaged by the crash of a military plane at an Air Force base.

On August 5, 1950, an Air Force B-29 crashed at the Fairfield-Suisun Air Force Base in California a few seconds after take-off (R. 49). The plane exploded near the base's trailer park, containing 48 trailers owned and occupied by servicemen in active duty status and assigned to the base at the time (R. 20, 49). The trailers and house-

hold and personal belongings in them suffered considerable damage.

Petitioners are the insurers of the various trailers (Pet. 4). In accord with the terms of insurance policies issued by them to the trailer owners, petitioners paid the servicemen a total of $68,340.57 for damage to the trailers (R. 5-6; Pet. 4). Administrative claims for damage to the property belonging to the military personnel were also filed with the Air Force by the servicemen under the Military Personnel Claims Act, *supra*, pp. 3-5, and were paid by the Air Force to the servicemen "except for that property covered by insurance, as provided by regulations under such statute" (R. 9, 15, 50).

The insurers' complaints, filed under the Federal Tort Claims Act, alleged that the crash resulted from negligent maintenance and operation of the Air Force plane (R. 5). The complaints further asserted that, by payment of the proceeds of the policies to the servicemen, the insurers had become "subrogated to the rights of their respective insureds" against the United States to that extent (R. 6).

The United States moved to dismiss (R. 10). In a supporting affidavit the Government showed that the insurers' claims were for property losses of "military personnel in the United States Air Forces stationed at [Fairfield-Suisun] Base in the discharge of military functions, and that all of these men were on active duty, and duly assigned to military functions, at and about the time of the

said crash" (R. 11, 49). The affidavit also showed that all of the property in question "was located on and within the said Base in an area duly assigned by competent military authority as an area for trailers in which the men slept between hours of work and that the area was under military protection" (R. 11).

The following additional facts with respect to the operation of the base trailer park were stipulated:

The detailed procedure controlling the operation and maintenance of the trailer park within the confines of the base were prescribed in a base regulation (R. 13, 51). Only Air Force personnel and their families assigned to the base were allowed to use the trailer park facilities (R. 51). Specific assignments and termination of trailer space were made by the base billetting officer (R. 51). Assignment of trailer park space automatically terminated when the base ceased to be the permanent station of the individual concerned (R. 17, 51). Like the rest of the Air Force base, the trailer park area was under military protection and subject to the jurisdiction of military police (R. 51).

While the military personnel living at the base trailer park were not required to live on the base, there was a critical housing shortage in the surrounding area (R. 50). The trailer park accordingly had been set aside within the base for the convenience and accommodation of military personnel and for the mutual benefit of the personnel and the Air Force (R. 16, 50).

The district court, upon consideration of the foregoing facts, ruled that the property damage sustained by the Air Force personnel was incident to their service, that their exclusive remedy was under the Military Personnel Claims Act, and that neither they nor their insurers could maintain suit under the Federal Tort Claims Act (R. 22-37). The Government's motions to dismiss were accordingly granted and the claims dismissed (R. 38; Pet 5).

The court of appeals affirmed (R. 49-58; Pet. Appendix A). It held that the insured servicemen were themselves barred from bringing an action for service-incident property damage under the Tort Claims Act on the grounds (1) that "there never has been and is not now any act of Congress * * * authorizing a serviceman in active duty status to sue the government for service incident property damage, however inflicted" and (2) that the serviceman's sole remedy on such a claim is the administrative relief provided by the Military Personnel Claims Act (R. 55). Limiting the servicemen to this administrative remedy, the court emphasized, "avoids the serious disruption of military mission and discipline that well might follow civil litigation based on such claims" (R. 55). Since the insured servicemen themselves could not bring suit under the Federal Tort Claims Act, the instant actions based on subrogation, being completely derivative in nature, were likewise held barred (R. 56, 58).

ARGUMENT

In order to establish the validity of their subrogation claims, petitioners must sustain the position that recovery may be had against the United States under the Federal Tort Claims Act on claims of members of the armed forces arising incident to their service. But this Court has already considered and rejected that precise contention as applied to personal injuries.[2] Since the record plainly establishes that the servicemen's claims here involved were in fact incident to their military service and since both courts below correctly applied the rationale of the decisions of this Court in denying recovery, there is, we submit, no warrant for further review of these cases.

1. It was implied in *Brooks* v. *United States,* 337 U.S. 49, 50, 52, that service-incident claims resulting, for example, from "a defective jeep," are not actionable under the Federal Tort Claims Act. The next case of *Feres* v. *United States,* 340 U.S. 135, left nothing to implication. The Court squarely held that the claims of military personnel there involved were not within the coverage of the Act because the claims arose as an incident of military service. This holding was reiterated seven months ago in *United States* v. *Brown,* 348 U.S. 110, 112, 113, where the Court expressly noted its adherence to the line drawn in the *Feres* case as to claims

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[2] *Feres* v. *United States,* 340 U.S. 135; *United States* v. *Brown,* 348 U.S. 110; and *Brooks* v. *United States,* 337 U.S. 49.

which "arise out of or are in the course of activity incident to service."

It is true that in both *Brooks* and *Brown*, unlike *Feres*, it was concluded that causes of action had been stated under the Tort Claims Act. But *Brooks* and *Brown*, as those two opinions carefully demonstrate, involved claims *not* incident to the claimants' military service. 337 U.S. 49, 52; 348 U.S. 110, 112. In the instant case, the facts leave no room for doubt that the claim, like that in *Feres*, is service-incident in nature and hence barred under the Act. This is clearly borne out by a comparison of the facts in the *Brown* and *Brooks* cases, on one hand, with those in *Feres* and the instant cases, on the other.

In *Brown*, a veteran sued the United States for the alleged negligence of another civilian at a Veterans Administration hospital. Brown's claim arose, the Court noted, not while "he was subject to military discipline" but "after his discharge, while he enjoyed a civilian status." 348 U.S. 110, 112. Similarly in *Brooks*, the plaintiff soldiers were riding in their privately owned automobile on a public highway when they were struck by a government vehicle driven by a civilian employee. They were not then on any business even remotely connected with their military service; nor were they on the highway, where they were hit, because of their being soldiers. 337 U.S. 49, 52.

The claims in *Feres*, on the other hand, show that they arose not only incident to military service but as a direct result thereof. *Feres* actually involved

three separate cases, those of *Feres, Griggs,* and *Jefferson,* 340 U.S. 135, footnote. Feres, after completing his military duty for the day, burned to death while sleeping in his quarters on the post. Negligence was asserted on the part of other military personnel in maintaining a defective heating plant in the quarters. The *Griggs* and *Jefferson* cases arose as malpractice actions by the plaintiff soldiers for alleged negligence on the part of Army surgeons at Army hospitals. In all three cases, it is obvious that the claims were incident to and had occurred because of the servicemen's military service—Feres was in his quarters on the post because he was in the service; Griggs and Jefferson were operated on by Army doctors on Army operating tables in an Army hospital because they were in the military service.

Similarly in the instant cases, as the findings of both lower courts make clear, the claims for "damage to the trailers of the servicemen arose out of and was in the course of activity incident to their military service" (R. 26, 57). It was only because the servicemen, whose trailers were destroyed, were members of the Air Force on active military duty status assigned to Fairfield-Suisun Air Force Base that they were allowed to make use of the trailer park facilities at the base (R. 50, 57-58). As observed by the court below, "The trailers were authorized to occupy the assigned spaces solely by virtue of the active military status of their owners" (R. 57). The trailer park area was "absolutely subject to military control and discipline" and "at

the time of the damage the trailer owners were all in active military duty status as distinguished from civilan or inactive military status" (R. 57). Obviously, in view of the regular heavy air traffic at any Air Force base, the servicemen's use of the trailer park surrounded them with the precise conditions out of which the instant claim arose. It follows, as the court below emphasized, that "the crash of an airplane immediately following takeoff from an Air Force base certainly has a real and substantial relationship to the military service of any serviceman assigned to such base" (R. 58). Since it was "solely by virtue of [the servicemen's] active military status" that their personal property was placed in the "zone of special danger," both courts below, we submit, correctly concluded that the instant claims arose incident to military service and hence were not cognizable under the Federal Tort Claims Act. See *O'Leary* v. *Brown-Pacific-Maxon,* 340 U.S. 504, 506-507; *Hartford Accident & Indemnity Co.* v. *Cardillo,* 112 F. 2d 11, 14 (C.A. D.C.), certiorari denied, 310 U.S. 649; *Allen* v. *D. D. Skousen Const. Co.,* 55 N. Mex. 1; *Wilson Cypress Co.* v. *Miller,* 157 Fla. 459.

The correctness of that conclusion is still further confirmed, as the opinion below shows, by administrative payment under the Military Personnel Claims Act for the servicemen's non-insured losses (R. 56). These payments by the Air Force "must," as stated by the court below, "be presumed to have been based on an administrative determination that the property damage occurred

'incident to service' since such is a requirement of the [Military Personnel Claims] Act and regulations for allowable claims." (R. 56.)

2. Petitioners' contention is that the *Feres* rule of governmental non-liability for service-incident claims applies only where damages are sought for personal injuries rather than for property damages (Pet. 7-10). But this Court's decisions in *Feres,* as well as in *Brown* and *Brooks,* show very plainly that governmental immunity from service-incident claims does not turn on any such fine distinction as to the particular element of damages for which recovery is sought. On the contrary, the decisions rested on broad considerations of the "special relationship of the soldier to his superiors" and to the Government, of the "effects of the maintenance of such suits on [military] discipline," and of the "sharp break in tradition" if a soldier were allowed to recover for the negligence of another soldier. *United States* v. *Brown,* 348 U.S. 110, 112, 113; *Feres* v. *United States,* 340 U.S. 135, 141. And the court below, in an opinion which carefully demonstrates that "each of these considerations is as applicable to property damage incident to service as to personal injury incident to service" (R. 52, 53, 54-55), correctly excluded the service-incident property damage claims from the Tort Claims Act.[3]

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[3] It is clear, for example, that allowing soldiers access to the courts under the Federal Tort Claims Act for claims arising incident to their military service would in large part shift the military's traditional right to self-regulation from

There is no conflict of decisions as to the applicability of the *Feres* rule to service-incident property damage. Indeed, the only other court of appeals decision in point holds squarely, as did the court below, that service-incident property damage claims are not actionable under the Federal Tort Claims Act. *Zoula* v. *United States,* 217 F. 2d 81, 84-85 (C.A. 5). Accord: *Ritzman* v. *Trent and the United States,* 125 F. Supp. 664, 666-667 (E. D. N. C.); *Wallis* v. *United States,* 126 F. Supp, 673, 674 (E.D.N.C.).[4]

3. Petitioners' claims based on subrogation must fail for a still further reason. The Military Personnel Claims Act, *supra,* pp. 3-5, authorizes payment of claims of "military personnel" and has been interpreted in administrative regulations to

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the military establishment to the civilian courts. Those courts would then "be required to pass upon the propriety of military decisions and actions and essential military discipline would be impaired by subjecting the command to the public criticism and rebuke of [the soldiers]." *Jefferson* v. *United States,* 178 F. 2d 518, 520 (C.A. 4), affirmed *sub nom. Feres* v. *United States,* 340 U.S. 135; see *In re Grimley,* 137 U.S. 147, 153; *Martin* v. *Mott,* 12 Wheat. 19, 30; *P. Dougherty Co.* v. *United States,* 207 F. 2d 626, 634 (C.A. 3), certiorari denied, 347 U.S. 912; *Archer* v. *United States,* 217 F. 2d 548, 551-552 (C.A. 9), certiorari denied, 348 U.S. 953.

It is equally clear that this "serious disruption of military mission and discipline" would, as held below (R. 55), be caused by civil litigation based on service-incident property damage claims to the same extent as it would be caused by such litigation based on service-incident personal injury claims.

[4] *Lund* v. *United States,* 104 F. Supp. 756 (D. Mass.), the only decision to the contrary, has never been followed and was expressly disapproved in the decisions below in the instant cases (R. 34, 58) and in the *Wallis* decision.

be limited to claims filed by servicemen on their own behalf and to exclude from its coverage "losses of insurers and other subrogees" and "losses * * * recovered or * * * recoverable from an insurer." 32 C.F.R. 836.93(i) and (j).[5] The limitation in these regulations obviously means that the United States agrees to make payment under the Military

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[5] The legislative history of the 1952 amendment to the Military Personnel Claims Act of 1945 demonstrates full Congressional awareness and approval of the administrative interpretation barring insurers from the benefits of the Military Personnel Claims Act. This interpretation was placed squarely before Congress when H. R. 404, 82d Cong., 2d sess., later enacted as the 1952 amendment was being considered. A copy of the administrative regulations setting forth this administrative interpretation of the Military Personnel Act appears in full in S. Rept. 1691, 82d Cong., 2d sess., p. 3, and specifically includes among the "claims not payable":

> i. Losses of subrogees.—Losses of insurers and other subrogees.
>
> j. Losses recoverable from insurer.—Losses, or any portion thereof, which have been recovered or are recoverable from an insurer.

Notwithstanding the fact that its attention was specifically directed to the administrative ban against payment of claims to insurers, Congress in no way modified that limitation. Instead, the 1952 amendment eliminated an entirely unrelated limitation concerning property damage claims on behalf of servicemen who died prior to the property damage loss. Apart from all other considerations, Congressional enactment of H. R. 404 into the 1952 amendment with full awareness that insurers' claims had regularly been rejected administratively but without any modification of that administrative interpretation, constitutes, we submit, an acceptance and ratification by Congress of the administrative interpretation barring insurance claims under the Military Personnel Claims Act. See *Fleming* v. *Mohawk Co.*, 331 U.S. 111; *Brooks* v. *Dewar*, 313 U.S. 354.

Personnel Claims Act to servicemen only on condition that the United States is to have the full benefit of any insurance effected on the property by servicemen with their private insurers. We submit that the presence of this condition constitutes an additional and independent basis for the insurers' inability to maintain the present Tort Claims Act suits against the Untied States.

Ever since *Phoenix Ins. Co.* v. *Erie Transportation Co.*, 117 U.S. 312, 321, 325, it has been recognized that such a condition is fully effective as against the insurer. All other cases are in accord in holding that an insurer's claim to subrogation rights cannot be recognized where the owner and carrier agree that the carrier shall have the benefit of any insurance effected by the owner. *Great Lakes Corp.* v. *S. S. Co.*, 301 U.S. 646, 654; *National Garment Co.* v. *New York, C. & St. L. R. Co.*, 173 F. 2d 32, 37 (C.A. 8); see 18 Comp. Gen. 203 (1938). The reasoning of the cited authorities fully applies here and compels the conclusion that the condition in the Military Personnel Claims Act regulations giving the United States the benefit of insurance taken out by servicemen, prevents recognition of petitioners' claims.

CONCLUSION

The decision below is clearly correct and is supported on an alternative basis which is independently dispositive of petitioners' claims. There is no conflict. It is respectfully submitted that the petition for writs of certiorari should be denied.

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AUGUST, 1955.

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Ritzman v. Trent and United States, 125 Fed. Supp. 664	1, 2
United States v. Aetna Cas. & Surety Co., 338 U. S. 366	3
Wallis v. United States, 126 Fed. Supp. 673	1
Zoula v. United States, 217 F. 2d 81	1

STATUTE	
Military Personnel Claims Act of 1945, Sec. 4	2

IN THE

Supreme Court of the United States

October Term, 1955

No. 222.

PREFERRED INSURANCE COMPANY, a corporation, MICHIGAN SURETY COMPANY, a corporation, MID-STATES INSURANCE COMPANY, a corporation, and THE MERCANTILE INSURANCE COMPANY OF AMERICA, a corporation,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

AND FIVE CONSOLIDATED CASES.

On Petition for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONERS' REPLY BRIEF.

The Government (Brief in Opposition, p. 14) seeks to bolster the decision of the Court of Appeals herein by citing *Zoula v. United States*[1] (C. A. 5), 217 F. 2d 81, and two decisions by the same District Judge (*Ritzman v. Trent and United States,* 125 Fed. Supp. 664 and *Wallis v. United States,* 126 Fed. Supp. 673).

[1]The *Zoula* case was discussed in Footnote 24, p. 23 of the Petition herein.

These decisions, as to the point here involved, do no more than cite with approval the decision of the District Judge herein and adopt his erroneous conclusion that service incident property damage claims are not covered by the Tort Claims Act because the Military Personnel Claims Act of 1945 was intended as the *"single"* remedy for such claims (see, for example, *Ritzman v. Trent, supra,* 125 Fed. Supp. 665, 667).

Nothing is clearer in this case than that such conclusion of the District Judge herein was completely erroneous. As pointed out in our Petition (pp. 14-15), Section 4 of the Military Personnel Claims Act of 1945 itself specifically provided that it was not the exclusive or "single" remedy for service incident property damage claims. The Government apparently reasons that because this basic error of the District Judge has been approved by the Court of Appeals herein and by the Court of Appeals for the Fifth Circuit and by the District Judge for the Eastern District of North Carolina, that such repeated approbation has the result of converting an obvious error into a sound conclusion. It is apparent that unless this Court grants this Petition, the erroneous reasoning and conclusion that permeates all these cases will be perpetuated.

The Government raises a point (Brief in Opposition, pp. 14-16) not referred to by the Court of Appeals, viz., that the exclusion of subrogated claims from the coverage of the Military Personnel Claims Act constitutes a bar to the claims here in suit. But this cannot be tenable since the claims here sued upon are brought under the Tort Claims Act and not under the Military Personnel Claims Act, and it has been held by this Court that subrogated claims are covered by the Tort Claims Act (*United States*

v. Aetna Cas. & Surety Co., 338 U. S. 366). Since service incident property damage claims are not restricted to the coverage of the Military Personnel Claims Act, it is apparent that the right to assert such a claim must be determined by the statute under which the claim is brought.

The Opinion of the Court of Appeals herein does not consider the important problem of statutory construction involved here. In its Brief in Opposition herein, the Government has seen fit to completely ignore the questions raised by the Petition (Pet. pp. 7-24). It is submitted that to ignore these questions cannot constitute a satisfactory or adequate disposition thereof.

We feel confident that this Court will not permit military personnel to be deprived of the substantial claim rights involved here, without according this problem the full and careful consideration to which it is entitled.

Respectfully submitted,

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